Mississippi Law Journal

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INTRODUCTION

In the United States, the financial crisis prompted unprecedented government bailouts for banks, mortgage servicers, the insurance giant American International Group, and automotive makers General Motors and Chrysler.[1] The U.S. economy shifted to financial services and products, and more behavioral regulation is underway for financial institutions deemed too-big-and-integral-to-fail. Federal regulators were incapable of addressing the abuses leading up to the financial crisis, unaware initially of the scope of the crisis, and inept in their initial response.[2] This is especially troubling when the U.S. Supreme Court, of late, appears more comfortable with the antitrust function being subsumed in the regulatory framework.[3]

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[1] *Bailout Recipients*, PROPUBLICA, http://bailout.propublica.org/main/list/index (last visited Nov. 1, 2011).

[2] *See* JOSEPH E. STIGLITZ, FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY (2010).

[3] Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109, 1124 (2009) (Breyer, J., concurring) ("When a regulatory structure exists to deter and remedy anticompetitive harm, the costs of antitrust enforcement are likely to be greater than the benefits."); Credit Suisse Sec. (USA) v. Billing, 551 U.S. 264, 280-81 (2007); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 414-15 (2004); *see also*

Although one can distinguish the financial services industry from other industries, the crisis raised important issues of market failure, weak regulation, the lack of understanding of systemic risk in financial markets, and moral hazard. Policymakers are now re-examining fundamental issues, such as the efficiency of markets[4] and the role of legal, social, and ethical norms in a market economy.[5] The financial crisis has also prompted calls for reinvigorating antitrust enforcement in the United States, toughening antitrust's legal standards[6] and breaking up firms deemed too-big-and-integral-to-fail.[7]

In reconsidering their antitrust policies, policymakers should return to first principles. Antitrust policy is built on a flawed assumption of rationality. As a result, antitrust provides an incomplete, and at times incorrect, account of competition. For the

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Edward D. Cavanagh, *The Private Antitrust Remedy: Lessons From The American Experience*, 41 LOY. U. CHI. L.J. 629, 636 (2010); Stacey L. Dogan & Mark A. Lemley, *Antitrust Law and Regulatory Gaming*, 87 TEX. L. REV. 685 (2009).

[4] *See* Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Vigorous Antitrust Enforcement In This Challenging Era, Remarks at the United States Chamber of Commerce (May 12, 2009), *available at* http://www.usdoj.gov/atr/public/speeches/245777.htm (rejecting assumption that markets are generally self-policing and self-correcting); *see also* J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, Managing Irrationality: Some Observations on Behavioral Economics and the Creation of the Consumer Financial Protection Agency, Remarks at the Conference on the Regulation of Consumer Financial Products (Jan. 6, 2010), *available at* http://www.ftc.gov/speeches/rosch/100106financial-products.pdf.

[5] *See, e.g.*, GEORGE A. AKERLOF & ROBERT J. SHILLER, ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM 26 (2009); ROBERT SKIDELSKY, KEYNES: THE RETURN OF THE MASTER 189 (2009); John Authers, *Wanted: New Model for Markets*, FIN. TIMES, Sept. 29, 2009, at 9; Rana Foroohar, *May the Best Theory Win: How Economists Are Competing To Make Sense Of Our Failed Financial System*, NEWSWEEK, Feb. 1, 2010, at 42-44 (discussing annual meeting of American Economic Association); Paul Krugman, *How Did Economists Get It So Wrong?*, N.Y. TIMES, Sept. 6, 2009, at 36; Gillian Tett, *The Emotional Markets Hypothesis and Greek Bonds*, FIN. TIMES, Apr. 10, 2010, at 7; STIGLITZ, *supra* note 2, at 238-74.

[6] *See* Press Release, U.S. Dep't of Justice, Justice Department Withdraws Report On Antitrust Monopoly Law: Antitrust Division to Apply More Rigorous Standard With Focus on the Impact of Exclusionary Conduct on Consumers (May 11, 2009), *available at* http://www.usdoj.gov/atr/public/press_releases/2009/245710.htm.

[7] *See, e.g.*, SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 208-22 (2010).

past thirty years, the Chicago,[8] post-Chicago,[9] and to the extent distinguishable, Harvard Schools[10] have debated over antitrust's legal standards. But all three schools assume a marketplace of rational[11] profit-maximizing firms and consumers with perfect willpower.[12] Therein lies the problem.

For meaningful change after the financial crisis, competition policymakers must reconsider three fundamental interrelated questions: First, what is competition? Second, what are the goals of the competition laws? Third, what legal standards should be used to promote these goals?

This article addresses the first question—*what is competition*?[13] The question seems so basic that it need not be asked. But as Part I discusses, no satisfactory definition of competition exists. Some consider competition as an idealized end-state (such as static price competition under the economic model of perfect competition). Others view competition as a dynamic process.

Part II explores one reason why multiple definitions of competition remain. Any theory of competition depends on its

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[8] *See, e.g.*, RICHARD A. POSNER, ANTITRUST LAW (2d ed. 2001); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

[9] *See, e.g.*, 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 113, at 134 (2d ed. 2000) ("[B]usiness firms are (or must be assumed to be) profit-maximizers."); Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 258 (2001); Symposium, *Post-Chicago Economics*, 63 ANTITRUST L.J. 445 (1995).

[10] *See* William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1 (2007) (summarizing contributions of Harvard School to modern antitrust analysis).

[11] Rationality under neoclassical economic theory has a narrow meaning—individuals are objective, seek out the optimal amount of information, readily and continually update their prior factual beliefs with relevant and reliable empirical data, and choose, after conducting a cost-benefit analysis, the best action according to stable, well-defined preferences. Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211, 1214-15 (2003). Rationality, as discussed herein, does not encompass its other meanings, such as being fair, pragmatic, thoughtful, compassionate, or virtuous. *Id.*

[12] Humans with perfect willpower take actions that are consistent with their own long-term interests.

[13] I discuss the second issue in *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. (forthcoming 2012), *available at* http://ssrn.com/abstract=1904686.

premises, the validity of which may not hold true across industries, countries, and time. Using recent developments in behavioral economics, Part II varies one premise of competition—the relative rationality of market firms and consumers. As the behavioral economic literature has shown over the past thirty years, and the recent financial crisis bore out, consumers and firms do not always behave rationally. Relaxing the assumption of rational firms and consumers yields four scenarios of competition.

Part III analyzes each scenario of competition and its policy implications. When one relaxes the assumption of rational firms and consumers, one's theory of competition extends beyond the current focus on static price competition in narrowly defined markets. Issues of systemic risk, behavioral exploitation, herding behavior, overconfidence bias, the importance of maintaining trial-and-error feedback loops, consumer choice, and competitive diversity all increase in importance. Part III examines the antitrust policy implications for each scenario of competition—if the government is relatively more or less rational than market participants. This article introduces several important challenges facing competition policy and provides several mechanisms for competition agencies to improve their policies.

I. DEFINING COMPETITION

A. Common Definitions of Competition

One popular antitrust treatise states, "Today it seems clear that the general goal of the antitrust laws is to promote 'competition' as the economist understands that term."[14] One problem, the treatise recognizes, is that economists can have a different conception of competition than lawyers and laypersons.[15] Another problem is that economists have not reached consensus in defining *competition*.

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[14] AREEDA & HOVENKAMP, *supra* note 9, at 4; *see also* AM. BAR ASS'N SECTION OF ANTITRUST LAW, REPORT ON ANTITRUST POLICY OBJECTIVES (Feb. 12, 2003), *available at* http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/report_policyobjectives.authcheckdam.pdf.

[15] AREEDA & HOVENKAMP, *supra* note 9, at 3.

The United States' Sherman Antitrust Act was enacted over a century ago.[16] But antitrust law, Robert Bork observed, "has not arrived at one satisfactory definition of 'competition.'"[17] This is surprising, considering the concept of competition is central to competition policy and economic thinking in general. Competition law focuses on anti-*competitive* restraints,[18] and one oft-described goal is to ensure an effective competitive process.[19] Yet the concept of competition, as economist John Vickers said, "has taken on a number of interpretations and meanings, many of them vague."[20] Others agree.[21] Most jurisdictions "maintain that their

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[16] 15 U.S.C. §§ 1-7 (2006).

[17] BORK, *supra* note 8, at 61 (1978).

[18] *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 898-99 (2007) (noting how courts can "devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones").

[19] INT'L COMPETITION NETWORK: UNILATERAL CONDUCT WORKING GRP., REPORT ON THE OBJECTIVES OF UNILATERAL CONDUCT LAWS, ASSESSMENT OF DOMINANCE/SUBSTANTIAL MARKET POWER, AND STATE-CREATED MONOPOLIES 6 (2007) [hereinafter 2007 ICN REPORT], *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf.

[20] John Vickers, *Concepts of Competition*, 47 OXFORD ECON. PAPERS 1, 3 (1995).

[21] United States v. Kennecott Copper Corp., 231 F. Supp. 95, 103 (S.D.N.Y. 1964) ("There is no one definition of competition. Economists do not agree over the meaning of the term nor do they agree how it can be achieved."); STANLEY N. BARNES ET AL., THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 318 (1955) ("The idea of competition itself . . . is not so easy to define."); Michael E. Porter, *Building the Microeconomic Foundations of Prosperity: Findings from the Business Competitive Index 2004*, *in* UNIQUE VALUE: COMPETITION BASED ON INNOVATION CREATING UNIQUE VALUE FOR ANTITRUST, THE ECONOMY, HEALTHCARE, EDUCATION AND BEYOND 64 (Charles D. Weller ed., 2004) (competitiveness "remains a concept that is not well understood, despite widespread acceptance of its importance"); WORLD BANK, WORLD DEVELOPMENT REPORT 2002: BUILDING INSTITUTIONS FOR MARKETS 140 (2002), *available at* http://econ.worldbank.org/external/default/main?pagePK=64165259&theSitePK=469372&piPK=64165421&menuPK=64166093&entityID=000094946_01092204010635 (finding in its survey of fifty countries' competition laws, "that different conceptions of competition exist across countries"); Jay B. Barney, *Types of Competition and the Theory of Strategy: Toward an Integrative Framework*, 11 ACAD. MGMT. REV. 791, 798 (1986) ("Competition . . . is a concept that can mean different things at different times to different firms."); Michael S. Lewis-Beck, *Maintaining Economic Competition: the Causes and Consequences of Antitrust*, 41 J. POL. 169, 171 (1979) (noting "the lack, among economists, of a generally accepted definition of competition"); Paul J. McNulty, *Economic Theory and the Meaning of Competition*, 82 Q.J. ECON. 639, 639 (1968) ("There is probably no concept in all of economics that is at once more fundamental and pervasive, yet less satisfactorily developed, than the concept of

competition laws 'preserve competition,'" observed the American Bar Association, but preserving competition "does not always mean the same thing in different jurisdictions and is sometimes only one of several objectives pursued under a country's antitrust law."[22] The Chilean Competition Tribunal, for example, said, "the only objective of competition policy is to promote and protect competition," but then recognized that "one of the main difficulties is to define legally what 'free competition means,' or to articulate why competition itself should be protected."[23]

Some view competition in its natural setting—as a cutthroat fight over scarce resources.[24] But within animal ecology, genetics, and evolution, the term *competition* has multiple meanings.[25] Antitrust policy, of course, does not encourage market participants in seeking scarce resources to maim or kill others.[26] Competition should not increase society's mortality rate.[27] Even within the animal kingdom, competition for scarce resources is not a

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competition."); Donghyun Park, *The Meaning of Competition: A Graphical Exposition*, 29 J. ECON. EDUC. 347, 356 (1998) ("[C]ompetition has become one of the most ambiguous concepts in economics."); George J. Stigler, *Perfect Competition, Historically Contemplated*, 65 J. POL. ECON. 1 (1957) (noting that the concept of competition was long treated with casualness); Neri Salvadori & Rodolfo Signorino, *The Classical Notion of Competition Revisited* 2 (MPRA Paper No. 22499 May 3, 2010), *available at* http://mpra.ub.uni-muenchen.de/22499/1/MPRA_paper_22499.pdf (noting that few would disagree with Vickers' statement).

[22] AM. BAR ASS'N, *supra* note 14, at 3.

[23] 2007 ICN REPORT, *supra* note 19, at 8. The report went on to state:

> In 2004, when the [Chilean Competition] Act was amended, the executive and legislative powers discussed whether 'free competition' should be defined more narrowly as a right to participate in economic activities, a means of promoting economic efficiency, or a means of enhancing consumer welfare. The legislators [as reported by the ICN] decided that the meaning of 'free competition,' that is, an effective competitive process, should be left to the Tribunal's interpretation, on a case-by-case basis.

Id.

[24] *See* R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!, 462 F.3d 690 (7th Cir. 2006) (noting that "'cutthroat competition' is a term of praise rather than condemnation" and consumers gain when firms try to "kill" the competition and take as much business as they can).

[25] *See* L.C. Birch, *The Meanings of Competition*, 91 AM. NATURALIST 5, 6 (1957).

[26] *Id.* at 6.

[27] *Id.* at 9.

prerequisite for "survival of the fittest," the natural selection of species.[28]

Many view competition as rivalry: "the effort of two or more parties acting independently to secure the business of a third party by offering the most favorable terms."[29] Several courts applied similar definitions, such as the "effort of two or more parties, acting independently, to secure the custom of a third party by the offer of the most favorable terms. . . . [t]he struggle between rivals for the same trade at the same time";[30] and the "independent endeavor of two or more persons or organizations within the realm of a chosen market place, to obtain the business patronage of others by means of various appeals, including the offer of more attractive terms or superior merchandise."[31]

Others question this characterization. Increasing the number of rivals does not necessarily increase, and can diminish, incentives to compete.[32] "An economist sees competition not in terms of rivalry per se, but in terms of market performance," said a former Department of Justice official,[33] further stating:

> An economist would say that a market is perfectly competitive when firms price their output at marginal cost and costs are minimized by internal efficiency. This does not necessarily require a large number of rivals. Where entry and

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[28] *Id.* at 13.

[29] *Competition Definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/competition (last visited Nov. 1, 2011); BARNES ET AL., *supra* note 21, at 318 (one conception of competition is "the self-interested and independent rivalry of two or more private competitors").

[30] Lipson v. Socony Vacuum Corp., 87 F.2d 265, 270 (1st Cir. 1937) (internal citations and quotation marks omitted).

[31] United States v. Aluminum Co. of Am., 91 F. Supp. 333, 355 (S.D.N.Y. 1950); *see also* New Eng. Theatres, Inc. v. Lausier, 86 F. Supp. 852, 856 (D. Me. 1949); United States v. Sutherland, 9 F. Supp. 204, 205 (W.D. Mo. 1934).

[32] *See* Avishalom Tor & Stephen M. Garcia, *The N-Effect: Beyond Winning Probabilities*, 21 PSYCHOL. SCI. 748 (2010), *available at* http://www-personal.umich.edu/~smgarcia/pubs/the_n-effect_reply.pdf.

[33] William J. Kolasky, Deputy Assistant Att'y General, Antitrust Div., U.S. Dep't of Justice, What Is Competition?, Address Before the Seminar on Convergence (Oct. 28, 2002), *available at* http://www.justice.gov/atr/public/speeches/200440.htm#N_7.

> exit are costless, markets can be perfectly competitive even with only one firm serving the entire market.[34]

The official characterized competition as "the process by which market forces operate freely to assure that society's scarce resources are employed as efficiently as possible to maximize total economic welfare."[35]

Competition, like athletic contests,[36] is not always zero-sum. It involves cooperation through voluntary endeavors among suppliers, wholesalers, retailers, and consumers. One can view competition as the voluntary process society elects to resolve conflicts of interest among its members.[37]

Competition can be vertical among firms in the distribution chain. Manufacturers often have a complementary and competitive relationship with firms from whom they buy and to whom they sell.[38] Not surprisingly, two of Professor Michael Porter's famous five competitive forces that impact a company's profits are vertical: (i) powerful customers seeking to "capture more value by forcing down prices, demanding better quality or more service (thereby driving up costs), and generally playing industry participants off against one another, all at the expense of industry profitability"; and (ii) "powerful suppliers" seeking to "capture more of the value for themselves by charging higher prices, limiting quality or services, or shifting costs to industry participants."[39]

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[34] *Id.*

[35] *Id.*

[36] *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984).

[37] *See* ARMEN A. ALCHIAN, ECONOMIC FORCES AT WORK 127 (1977).

[38] Robert L. Steiner, *Market Power in Consumer Goods Industries*, *in* PRIVATE LABELS, BRANDS, AND COMPETITION POLICY: THE CHANGING LANDSCAPE OF RETAIL COMPETITION 73 (Ariel Ezrachi & Ulf Bernitz eds., 2009); Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. (C 31) ¶ 64 [hereinafter Assessment of Horizontal Mergers], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0205%2802%29:EN:NOT ("The competitive pressure on a supplier is not only exercised by competitors but can also come from its customers.").

[39] Michael E. Porter, *The Five Competitive Forces That Shape Strategy*, HARV. BUS. REV., Jan. 2008, at 29-30; *see also* Toys "R" Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000).

Competition is also normative.[40] What we observe—as competition reflects, in part—are the legal constraints and incentives as well as informal social, ethical, and moral norms.[41] Societies distinguish between "competition on the merits" and unfair methods of competition.[42] Those terms, subject to different interpretations,[43] imply that competition can be good or bad, based on society's "generalized standards of fairness and social utility."[44] Market participants, through the legislature, industry codes, and informal norms, set the rules and punishments. At times, competition is considered "ruinous" or "cutthroat."[45] At times, competition with foreign firms is criticized as "structurally and qualitatively unequal."[46] At other times, competition is curtailed to promote other societal goals.[47]

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[40] *See* Xiaoye Wang, *The New Chinese Anti-Monopoly Law: A Survey of a Work in Progress*, 54 ANTITRUST BULL. 579, 580 (2009) (observing how China until the late 1970s viewed the term competition pejoratively "as a capitalist monster").

[41] *See* DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE 60, 123 (2005).

[42] *See* 15 U.S.C. § 45(a) (2006) (prohibiting "unfair or deceptive acts or practices in or affecting commerce"); Commission Regulation 864/2007, art. 6, 2007 O.J. (L 199/40) (EC) (discussing unfair competition and acts restricting free competition); Free Trade Agreement Between the European Union and its Member States and the Republic of Korea, 2011 O.J. (L127/6); FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) ("[U]nfair competitive practices were not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws; nor were unfair practices in commerce confined to purely competitive behavior.").

[43] *See* Organisation for Economic Co-operation and Development, *What is Competition on the Merits?*, POL'Y BRIEF, June 2006, at 1, *available at* http://www.oecd.org/dataoecd/10/27/37082099.pdf (noting that "expression competition on the merits" has "never been satisfactorily defined," which has "led to a discordant body of case law that uses an assortment of analytical methods," which in turn "has produced unpredictable results and undermined the term's legitimacy along with policies that are supposedly based on it").

[44] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1, at 9 (1993).

[45] *See* Organisation for Economic Co-operation and Development, *Cut-Throat Competition*, GLOSSARY OF STATISTICAL TERMS, http://stats.oecd.org/glossary/detail.asp?ID=3186 (last visited Nov. 1, 2011) (Cut-throat competition "refers to situations when competition results in prices that do not chronically or for extended periods of time cover costs of production, particularly fixed costs. This may arise in secularly declining or 'sick' industries with high levels of excess capacity or where frequent cyclical or random demand downturns are experienced.").

[46] JAMES KYNGE, CHINA SHAKES THE WORLD: A TITAN'S RISE AND TROUBLED FUTURE—AND THE CHALLENGE FOR AMERICA 109 (2007) (concerns over China's

Nor is competition always desirable. Status competition (including competing over conspicuous consumption) can increase envy and misery.[48] As economist Richard Layard observed, "We do want the maximum of competition between firms, but not between individuals. We want a lot of cooperation between individuals, for one reason above all—that life is more enjoyable that way."[49]

When referring positively to competition, policymakers often cite its effects, such as "low prices, high quality products, a wide selection of goods and services, and innovation."[50] But the effects do not define competition itself and are sometimes inconsistent. Higher prices and reduced output, remarked the Supreme Court, are "the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit."[51] But a divided Court recently recognized that vertical restraints that lead to higher prices can nonetheless be pro-competitive.[52] Manufacturers today can prevent retailers—through resale price maintenance—from discounting their goods. At times, increased price competition (for

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currency being undervalued, and keeping costs artificially low with poor safety, environmental and worker standards, and by subsidizing energy and water).

[47] *See* United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 301 (1945) (Frankfurter, J., concurring) ("If a State for its own sufficient reasons deems it a desirable policy to standardize the price of liquor within its borders either by a direct price-fixing statute or by permissive sanction of such price-fixing in order to discourage the temptations of cheap liquor due to cutthroat competition, the Twenty-first Amendment gives it that power and the Commerce Clause does not gainsay it.").

[48] *See* Maurice E. Stucke, *Money, Is That What I Want? Competition Policy and the Role of Behavioral Economics*, 50 SANTA CLARA L. REV. 893 (2010).

[49] Richard Layard, *Happiness and Public Policy: A Challenge to the Profession*, 116 ECON. J. C24, C31 (2006).

[50] Assessment of Horizontal Mergers, *supra* note 38; *see also* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) ("[U]nrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress . . . ."); U.S. DEP'T OF JUSTICE, ANTITRUST ENFORCEMENT AND THE CONSUMER 1 (1996), *available at* http://publications.usa.gov/USAPubs.php?PubID=5195 ("Free and open competition benefits consumers by ensuring lower prices and new and better products."); FED. TRADE COMM'N, COMPETITION COUNTS: HOW CONSUMERS WIN WHEN BUSINESSES COMPETE (Mar. 2007), *available at* http://www.ftc.gov/bc/edu/pubs/consumer/general/zgen01.shtm ("Competition in America is about price, selection, and service. It benefits consumers by keeping prices low and the quality and choice of goods and services high.").

[51] NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 107-08 (1984).

[52] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

example, intra-brand competition[53]) leads to more free-riding, fewer services and innovation, and ultimately fewer choices and firms.[54] At times, greater innovation comes from excluding competitors from making, using, or selling the product at a lower price.[55]

B. Perfect vs. Dynamic Competition

Within antitrust, two popular theories of competition are as: (i) an ideal end-state (perfect competition), and (ii) a process (dynamic competition).[56] Perfect competition, according to some, is "the most competitive market imaginable in which everybody is a price-taker."[57] In the "perfectly competitive" market, "buyers and sellers are so numerous and well informed that each can act as a price-taker, able to buy or sell any desired quantity without

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[53] *See* Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). A vertical non-price restraint can potentially and simultaneously reduce "intra-brand competition" (e.g., competition among Sylvania dealers for Sylvania television sets) and stimulate inter-brand competition (e.g., competition among different manufacturers of television sets, such as Zenith or RCA).

[54] *See Leegin Creative Leather Prods.*, 551 U.S. at 890-91; Louis D. Brandeis, *Price and Competition*, *in* THE SOCIAL AND ECONOMIC VIEWS OF MR. JUSTICE BRANDEIS 398 (1930) (observing how "[u]nrestricted competition . . . leads to monopoly"); *see also* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 34 (Apr. 2007), *available at* http://www.justice.gov/atr/public/hearings/ip/222655.htm (discussing "a winner-take-all standards war," in which "firms vigorously compete . . . to establish their technology as the de facto standard"); Peter O. Steiner, *Program Patterns and Preferences, and the Workability Competition in Radio Broadcasting*, 66 Q.J. ECON. 194, 212-17 (1952).

[55] *See* Pfaff v. Wells Elecs., Inc., 525 U.S. 55, 63 (1998) ("The balance between the interest in motivating innovation and enlightenment by rewarding invention with patent protection on the one hand, and the interest in avoiding monopolies that unnecessarily stifle competition on the other, has been a feature of the federal patent laws since their inception."); H.R. REP. NO. 60-2222, at 7 (1909) (copyright law considers "how much the monopoly granted [would] be detrimental to the public . . . [as] the granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly").

[56] Mark Blaug, *Is Competition Such a Good Thing? Static Efficiency Versus Dynamic Efficiency*, 19 REV. INDUS. ORG. 37, 37 (2001) (noting distinction goes to early history of economics).

[57] *Competition Definition*, ECONOMIST.COM, http://www.economist.com/economics-a-to-z/c (last visited Nov. 1, 2011).

affecting the market price."[58] Between monopoly and perfect competition are degrees of imperfect competition.[59]

Others, like F.A. Hayek, question this theory of competition.[60] Competition by its nature is not an end-state but a complex and unpredictable dynamic process. The imperfections and limitations of human knowledge and the variety of conditions intrinsic to or affecting markets (including legal, social and ethical norms, technology, production, and service norms) necessitate against a stable competitive end-state.

The 2010 revisions to the U.S. Horizontal Merger Guidelines reflect the divide between static price competition and competition as a dynamic process.[61] The 2010 Guidelines are an improvement over the earlier Guidelines in recognizing non-price dimensions of competition.[62] But the criticism remains that the 2010 Guidelines primarily focus on static competition in narrowly defined antitrust markets.[63] Thus, one complaint endures. Competition officials recognize the importance of dynamic competition for our nation's

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[58] JOHN BLACK, A DICTIONARY OF ECONOMICS 348 (1997); *see also* William J. Kolasky, *What Is Competition? A Comparison of U.S. and European Perspectives*, 49 ANTITRUST BULL. 29, 31 (2004).

[59] *See* F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 16-18 (2d ed. 1980).

[60] FRIEDRICH A. HAYEK, INDIVIDUALISM AND ECONOMIC ORDER (1948); *see also* 2007 ICN REPORT, *supra* note 19, at 28 (noting that ten of thirty-two surveyed competition agencies "focus[ed] on fostering a competitive *process* that is dynamic in nature").

[61] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html.

[62] *Compare id.* at § 2 (discussing throughout how market power can be manifested in "non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation"), *with* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 0.1 n.6 (1992, revised 1997), *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf (relegating non-price competition to one footnote: "Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation.").

[63] *See, e.g.*, Jay Ezrielev & Janusz A. Ordover, *The 2010 Horizontal Merger Guidelines: A Static Compass in a Dynamic World?*, ANTITRUST SOURCE, Oct. 2010, at 1; J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, The Next Challenges for Antitrust Economists, Remarks at the NERA 2010 Antitrust & Trade Regulation Seminar (July 8, 2010), *available at* http://www.ftc.gov/speeches/rosch/100708neraspeech.pdf.

long-term economic growth,[64] but antitrust law has ossified around static price competition.[65]

Consequently, competition, while ubiquitous, can take different forms. Market participants compete to secure greater monetary profits. Sycophants in authoritarian regimes compete to curry favor with superiors. So, the issue is not whether competition exists, but "what kind of competition should exist."[66] Competition can occur: (i) on various dimensions (such as price, quality, service, variety, innovation) across markets; (ii) operating at different levels of efficiency; (iii) with different levels of product differentiation, entry barriers, and transparency; (iv) at different stages of the product life cycle; and (v) with different demands for technological innovation. But while competition is ubiquitous, economists, policymakers and scholars have not agreed upon a theory of competition.

II. RE-EXAMINING THE ASSUMPTIONS UNDERLYING COMPETITION AND COMPETITION LAW

As Part I discusses, competition has multiple meanings. This Part explores one reason why we have not arrived at one

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[64] Thomas O. Barnett, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Competition Enforcement in an Innovative Economy 4-5, Remarks at the 4th Annual Competition Policy Conference (June 20, 2008) (quoting Robert M. Solow, Prize in Economic Sciences in Memory of Alfred Nobel 1987: Growth Theory and After (Dec. 8, 1987), http://nobelprize.org/nobel_prizes/economics/laureates/1987/solow-lecture.html), *available at* http://www.justice.gov/atr/public/speeches/234246.pdf.

[65] J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, Promoting Innovation: Just How "Dynamic" Should Antitrust Law Be?, Remarks Before the USC Gould School of Law 2010 Intellectual Property Institute (Mar. 23, 2010), *available at* http://www.ftc.gov/speeches/rosch/100323uscremarks.pdf (observed how antitrust "has historically focused more on static than dynamic analysis"); *see also* Michael E. Porter, *Competition and Antitrust: A Productivity-Based Approach*, *in* UNIQUE VALUE: COMPETITION BASED ON INNOVATION: CREATING UNIQUE VALUE FOR ANTITRUST, THE ECONOMY, HEALTHCARE, EDUCATION AND BEYOND 154, 157 (Charles D. Weller ed., 2004) ("While protecting short-run consumer welfare measured by price-cost margins is . . . important, . . . productivity growth through innovation, where innovation is defined broadly to include not only products, but also processes and methods of management . . . [are] the single most important determinant of long-term consumer welfare and a nation's standard of living.").

[66] LUDWIG VON MISES, BUREAUCRACY 86 (Bettina Bien Greaves ed., Liberty Fund 2007) (1944).

satisfactory theory of competition. Any theory of competition depends on its premises, the validity of which depends on the context. Among the assumptions in any theory of competition are: (i) the rationality of the market participants; (ii) the amount of information they have; (iii) the transaction costs and the speed of transactions; (iv) the degree to which market participants act independently of one another and care about the interests of third parties; and (v) how formal rules and informal social, ethical, or moral norms affect the market participants' behavior.

This article focuses on one important assumption, namely the extent to which firms, consumers, and the government are rational and act with perfect willpower.[67] In relaxing this assumption, one's conception of competition changes. Firms can be relatively more or less rational than consumers in displaying the biases and heuristics identified in the behavioral economics literature. Accordingly, our conception of competition can vary under the following four scenarios:

	Consumers, Rational	**Consumers, Bounded Rational**
Firms, Rational	I.	II.
Firms, Bounded Rational	III.	IV.

As economist Douglass North observed, "The government is not a disinterested party in the economy."[68] Consequently, for each scenario, this Part examines the policy implications if the government is either relatively more or less rational than consumers and firms.

Several caveats are necessary. First, this article simplifies by examining consumers' and firms' rationality. One can extend the analysis to the rationality of intermediaries (e.g., suppliers, wholesalers, and retailers), and firms as buyers and consumers as

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[67] For the normative and descriptive shortcomings of the third prong of rational choice theory, namely individuals pursue solely their economic self-interest, see Stucke, *supra* note 48, at 907-17.

[68] NORTH, *supra* note 41, at 67.

sellers of services. Second, it is an oversimplification to say that millions of consumers and firms are either rational or bounded rational. Under any scenario, some market participants will be relatively more rational and have greater willpower than others. Bounded rationality and willpower can increase or decrease over time. People at any moment can act "more or less rationally depending on a host of situational, emotional, and other contingent influences."[69] Nor is behavior consistent. People can behave differently depending on their gender[70] or situational factors, such as whether they are alone or in groups.[71] Third, firms as institutions can be bounded rational, although in different ways and degrees than consumers. Firms, at times, can minimize individual biases, but at other times (such as cults, mobs, and "groupthink"[72]) can displace independent thinking.

Finally, in mapping each scenario, this article first examines competition using the interaction of firms and consumers, and then introduces the rationality of the government in discussing the policy implications. This article's baseline is a free-market economy. With a centrally-planned economy, the analysis begins by examining the rationality of the government relative to private firms and consumers. With these caveats in mind, the purpose here is to explore generally how our theory of competition changes when relaxing one key assumption.

III. FOUR SCENARIOS OF COMPETITION AND THEIR POLICY IMPLICATIONS

A. Scenario I: Both Firms and Consumers Are Rational

The first scenario reflects neoclassical economic theory and competition policy today. A perfectly competitive market assumes

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[69] Donald C. Langevoort, *The Behavioral Economics of Mergers and Acquisitions*, 12 TENN. J. BUS. L. 65 (2011), *available at* http://trace.tennessee.edu/transactions/vol12/iss2/4.

[70] *See, e.g.*, Jeff Sommer, *How Men's Overconfidence Hurts Them as Investors*, N.Y. TIMES, Mar. 14, 2010, at BU4.

[71] *See* PHILIP ZIMBARDO, THE LUCIFER EFFECT (2008).

[72] Robert S. Baron, *So Right It's Wrong: Groupthink and the Ubiquitous Nature of Polarized Group Decision Making*, *in* 37 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 219 (M.P. Zanna ed., 2005).

transparent prices, highly elastic demand curves, easy entry and exit, and perfectly informed, rational profit-maximizing producers and consumers.[73] In this scenario, price equals marginal cost. Market forces will deliver the efficient level of outputs with the most efficient techniques, using the minimum quantity of inputs.[74]

But perfect competition, critics have long argued, cannot serve as the policymaker's conception of competition.[75] First, as the Chicago School jurist Richard Posner recognized, "No market fits the economist's model of perfect competition."[76] Second, perfect competition is inconsistent with our real world view of competition, which over the past century has increasingly focused on productive and dynamic efficiencies.[77] Imagine the reaction in an Ivy-League MBA program, where perfect competition is the idealized end-state. If true, perfect competition would render the students' services and future employers' products as fungible and their high tuition unnecessary. Instead, for MBA students, competition "is a perpetual flight from the zero-profit abyss."[78]

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[73] *See* BLACK, *supra* note 58, at 348.

[74] *See* PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 106-41 (15th ed. 1995).

[75] *See* Blaug, *supra* note 56, at 39; HAYEK, *supra* note 60, at 96; McNulty, *supra* note 21, at 641; Park, *supra* note 21, at 349; *see generally* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (3d ed. 1942).

[76] FTC v. Elders Grain, Inc., 868 F.2d 901, 907 (7th Cir. 1989); *accord* United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1368 (5th Cir. 1980) ("Perfect competition is a theoretical concept; all markets are subject to varying degrees of imperfections . . . .") (quoting Arthur D. Austin, *Real Estate Boards, and Multiple Listing Systems as Restraints of Trade*, 70 COLUM. L. REV. 1325, 1353 (1970)); ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 2 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf ("[T]he real world contains very few such markets.").

[77] Vickers, *supra* note 20, at 7; *see also* Douglass C. North, *Economic Performance Through Time*, 84 AM. ECON. REV. 359, 359 (1994) ("Neoclassical theory is simply an inappropriate tool to analyze and prescribe policies that will induce development."); HAYEK, *supra* note 60, at 96 ("Advertising, undercutting, and improving ("differentiating") the goods or services produced are all excluded by definition—'perfect' competition means indeed the absence of all competitive activities."); McNulty, *supra* note 21, at 649.

[78] M.A. Adelman, *Economic and Legal Concepts of Competition*, 41 J. FARM ECON. 1197, 1197 (1959); *see also* Mary Keeney et al., *How do Firms Set Prices? Survey Evidence from Ireland* 3 (May 2010) (Cent. Bank & Fin. Servs., Research Technical Paper No. 7/RT/10), *available at* http://www.centralbank.ie/publications/

Third, the model, which idealizes homogeneity in products and knowledge, is far from desirable. Who wants to live in a world where after providing homogenous goods and services, we drive homogenous cars to homogenous homes?[79]

In defense of perfect competition, the Chicago School economist George Stigler said that any concept to be useful in scientific analysis must be abstract: "[I]f a science is to deal with a large class of phenomena, clearly it cannot work with concepts that are faithfully descriptive of even one phenomenon, for then they will be grotesquely undescriptive of others."[80] Under his logic, zoologists could not distinguish among Alaskan Hares (*Lepus othus*), Arctic Hares (*Lepus arcticus*), and Black-tailed Jackrabbits (*Lepus californicus*). Zoologists simply would call them collectively as creatures that hop. Moreover, if a zoologist calls these creatures Alaskan Hares, she is correct at least sometimes (when a *Lepus othus* hops by her). But if an economist describes all competition as perfect competition, she is always wrong. Perfect competition does not embrace or represent any form of actual competition. It is akin to the Easter Bunny.

An economic model can assume idealized conditions: market participants are *rational* with *perfect* knowledge of the conditions of supply and demand. Under these conditions, market participants "are supposed to know absolutely the consequence[s] of their acts when they are performed, and to perform them in the light of the consequences."[81] But since perfect competition is

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documents/7RT10.pdf (finding that autonomous price setting prevails when a firm considers competition to be absent, the most common approach in setting price is based on firms' costs and self-determined profit margin, and only one-third of firms set price primarily by following that of their closest competitor). For an excellent recent discussion of this, see Deven R. Desai & Spencer Waller, *Brands, Competition, and the Law*, 2010 BYU L. REV. 1425.

[79] One example was the Cultural Revolution in China where "[a]ny form of personal taste in clothing was out of bounds—women wore uniformly flat heels and most people donned Red Guard-style green uniform jackets, baggy trousers and caps, with a badge of the Chairman [Mao] on the tunic pocket." JONATHAN FENBY, THE PENGUIN HISTORY OF MODERN CHINA: THE FALL AND RISE OF A GREAT POWER 1850-2009, at 457 (2009); *see also* RODERICK MACFARQUHAR & MICHAEL SCHOENHALS, MAO'S LAST REVOLUTION 116 (2006).

[80] Stigler, *supra* note 21, at 17.

[81] *Id.* at 12 (quoting FRANK KNIGHT, RISK, UNCERTAINTY AND PROFIT (1921)).

neither descriptive nor normative, it is of little utility in dealing with day-to-day antitrust issues.

The next gradation is to assume *rational* actors with *incomplete* knowledge. Some information is unobtainable. Other information, while obtainable, is too costly to procure.[82] In this market economy, the Austrian School economist Ludwig von Mises observed that rational consumers, not firms, should be supreme. In their purchasing behavior, consumers ultimately determine "what should be produced and in what quantity and quality."[83] Mises, in his belief of consumer sovereignty, was skeptical about the evils of private monopolies—rational consumers with willpower often can take care of themselves in the marketplace. But this is not always true.[84] Imperfect information and informational asymmetries, for example, can lead to "lemon" markets where dishonest dealers for goods or services drive out honest dealers,[85] and thereby inhibit innovation.

The trickier aspect, as the next three scenarios address, is the descent to *bounded rational* actors with *imperfect* willpower, who act with *incomplete* knowledge.

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[82] William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, 71 ANTITRUST L.J. 207, 250 (2003) ("Rational consumers and producers will invest in becoming informed only up until the point where the marginal cost of information equals its marginal value.").

[83] MISES, *supra* note 66, at 17.

[84] *See, e.g.*, Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 477-78 (1992); Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 446 n.4 (3d Cir. 1997) (Lay, J., dissenting) ("Kodak is merely a concession to fact that markets do not always work perfectly, and sometimes, but not always, these [information] imperfections can create sufficient market power to justify possible antitrust liability."); *see also* Robert H. Lande, *Chicago Takes It On The Chin: Imperfect Information Could Play A Crucial Role In The Post-*Kodak *World*, 62 ANTITRUST L.J. 193, 195 (1993) ("Another important lesson of Kodak is that imperfect information can be a crucial factor in defining relevant markets.").

[85] *See* FTC v. Winsted Hosiery Co., 258 U.S. 483, 494 (1922) ("The honest manufacturer's business may suffer, not merely through a competitor's deceiving his direct customer, the retailer, but also through the competitor's putting into the hands of the retailer an unlawful instrument, which enables the retailer to increase his own sales of the dishonest goods, thereby lessening the market for the honest product."); George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 495 (1970) (explaining that the cost of dishonesty includes "loss incurred from driving legitimate business out of existence").

1. Scenario I's Policy Implications Assuming the Government Is Rational

A trinity of rational firms, consumers, and government paradoxically can justify either limited government or a centrally-planned economy.[86] As Stigler observed, a "perfect market may also exist under monopoly."[87] Logically monopolies can be private or government enterprises. If the latter, a state planner could model scenarios using the hypothetical profit-maximizer and centrally plan a similar outcome. Because rational profit-maximizing behavior is predictable, a temptation exists to nudge competition closer to perfect competition under "the guiding hand of some elite corps of governmental and non-governmental policy-makers."[88]

On the other hand, the stronger the presumption of rationality, the laissez-faire argument goes, the more likely the market is perceived in becoming efficient, and the less need for governmental regulation.[89] Generally, rational market participants acting with the optimal amount of information in markets with no negative externalities, do not need much governmental protection.[90] Transactions are presumably mutually beneficial: market participants contract to further their interests. The government perhaps can facilitate competition by reducing the market participants' transaction costs (such as providing a model contract and well-functioning judiciary system) or by lowering the participants' search and information costs (such as

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[86] *See* JOHN CASSIDY, HOW MARKETS FAIL: THE LOGIC OF ECONOMIC CALAMITIES 59 (2009) (discussing Oskar Lange's same observations on a centrally-planned economy and perfect competition).

[87] Stigler, *supra* note 21, at 14.

[88] Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 378 (1965).

[89] *See* Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 485 n.23 (3d Cir. 1992) ("Most of the work of 'Chicago School' theorists has centered on the general proposition that significant economic harm cannot occur (and hence the antitrust laws should not interfere) in competitive markets."); Michael A. Salinger, *Behavioral Economics, Consumer Protection, and Antitrust*, 6 COMPETITION POL'Y INT'L 65, 68 (2010).

[90] *See* JOHNSON & KWAK, *supra* note 7, at 69.

combating fraud).[91] But the stronger the rationality presumption, the more likely the government, subject to rent-seeking, is perceived to impede efficiency.[92]

Even in Scenario I, it does not follow that the government does little. First, the government must address the commonly identified types of market failure under neoclassical economic theory, such as: (i) the sustained exercise of market power;[93] (ii) externalities;[94] (iii) public goods;[95] and (iv) significant informational asymmetries or uncertainty.[96] So, the rational government can increase price transparency (by restricting competitors' concerted efforts to reduce it or mandating public disclosures), internalize negative externalities (such as imposing on polluters a carbon tax), prosecute anticompetitive restraints of trade (such as price-fixing cartels or monopolist's efforts to unfairly increase rivals' costs or deter entry), and enjoin mergers to monopoly.

Second, competitive markets do not always yield the best or desired outcome. "It is *not* a correct deduction from the Principles of Economics that enlightened self-interest always operates in the public interest."[97] Unbridled capitalism, Professors Akerlof and Shiller write, "does not automatically produce what people really need; it produces what they *think* they need, and are willing to

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[91] *See generally* Maurice E. Stucke, *How Do (and Should) Competition Authorities Treat a Dominant Firm's Deception?*, 63 SMU L. REV. 1069 (2010).

[92] *See, e.g.*, Avinash Dixit, *In Honor of Paul Krugman: Winner of the John Bates Clark Medal*, 7 J. ECON. PERSP. 173, 182 n.7 (1993) ("[T]here is no market failure so bad that the U.S. government and political process could not do even worse.").

[93] CASSIDY, *supra* note 86, at 126.

[94] A.C. PIGOU, THE ECONOMICS OF WELFARE 192 (4th ed. 1962); BLACK, *supra* note 58, at 168 (where the "cost or benefit arising from any activity which does not accrue to the person or organization carrying on the activity").

[95] Francis M. Bator, *The Anatomy of Market Failure*, 72 Q.J. ECON. 351, 369 (1958) (whereby the payers for the goods cannot exclude the non-payers from consuming (or benefitting) from the goods (e.g., national defense)).

[96] *Asymmetric Information Definition*, ECONOMIST.COM, http://www.economist.com/economics-a-to-z#node-21529485 (defining asymmetric information as "[w]hen somebody knows more than somebody else"); *see also* François Moreau, *The Role of the State in Evolutionary Economics*, 28 CAMBRIDGE J. ECON. 847, 849 (2004).

[97] JOHN MAYNARD KEYNES, THE END OF LAISSEZ-FAIRE 39 (1927); *see also* STIGLITZ, *supra* note 2, at 273.

pay for."[98] Competition can maximize output of products that eventually wipe out the economy.[99]

Third, the government must address behavior that is individually rational but collectively irrational.[100] In examining the financial crisis, for example, Posner described how rational self-interested behavior of "law-abiding financiers and consumers can precipitate an economic disaster."[101] Self-interest, for Posner, is a private virtue in that competition drives businesses to profit-maximization, which drives economic progress.[102] But competitive self-interested behavior, at times, is a public vice. An overleveraged financial institution can ignore the small probability that its risky conduct in conjunction with its competitors' risky conduct may bring down the entire economy. Each firm in pursuing its self-interest will incur greater leverage to maximize profits.[103] So, even for rational-choice theorists like Posner, the government must serve as a countervailing force to such self-interested rational private behavior by better regulating financial institutions.[104]

2. Scenario I's Policy Implications Assuming the Government Is Bounded Rational

Rational firms and consumers often will be worse off when a bounded rational government seeks to regulate their competitive behavior. Market forces invariably would provide a more efficient or timely solution.[105]

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[98] AKERLOF & SHILLER, *supra* note 5, at 26.

[99] *Id.*; *see also* Anthony Faiola et al., *What Went Wrong?*, WASH. POST, Oct. 15, 2008, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/10/14/AR2008101403343.html (noting several Clinton and Bush Administration officials' opposition to regulation of derivatives).

[100] CASSIDY, *supra* note 86, at 139-50, 309.

[101] RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION 107 (2009); *see also id.* at 111-12; CASSIDY, *supra* note 86, at 209-17.

[102] POSNER, *supra* note 101, at 107.

[103] *See, e.g.*, CASSIDY, *supra* note 86, at 221-27.

[104] POSNER, *supra* note 101, at 106-07.

[105] HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 124 (2005) ("[M]arkets generally work well when left alone, [and] intervention is

But one first must inquire why the government is less rational than the market participants. One theory is dispositional—the government attracts bounded rational employees, namely, as Mises called them, those "unfit to serve [their] fellow citizens," but who want to rule them.[106] But this assumes that civil servants' disposition differs from consumers' and firms'. Government workers, however, are also consumers (and former employees in private firms). Consequently, it is unlikely that civil servants are more rational in their private market transactions (or prior jobs) than in their government offices.

A second theory is that the bounded rationality is situational. Market forces provide greater incentives for private firms and consumers to improve their willpower and rationality.[107] In their work decisions, civil servants, in contrast, have weaker incentives to avoid mistakes because of political myopia, the lack of direct accountability to voters, and regulatory capture. Under this theory, attracting business executives to oversee government agencies, and promoting a revolving door between the government and private sector will not eliminate bounded rationality, as the situational forces remain. The bureaucracy is not structured to experiment for the purpose of maximizing profits, but for the employees, consistent with the rule of law, to "obey rules and regulations established by a superior body."[108]

Logically under this scenario, a bounded rational government should not be problematic for competition policy. There exists the risk that the government, captured by powerful interests, impedes competition. But rational citizens, recognizing this risk, would rely on structural, rather than behavioral, safeguards to prevent the concentration of power in either the government or

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justified only in the relatively few cases where the judiciary can fix the problem more reliably, more cheaply, or more quickly than the market can fix itself.").

[106] MISES, *supra* note 66, at 75.

[107] *See* Edward L. Glaeser, *Paternalism & Psychology*, 73 U. CHI. L. REV. 133, 140-41, 144-45 (2006) (modeling how consumers face stronger incentives to correct errors that directly impact their well-being than do government bureaucrats).

[108] MISES, *supra* note 66, at 55.

marketplace.[109] Accordingly, the demand for governmental antitrust services would diminish to the instances of sustained market failure, which market forces cannot correct. The bounded rational government would undertake measures (preferably structural) to prevent (or remedy) these market failures, under the careful guidance of rational voters. Otherwise, rational market participants in a well-functioning democracy would increasingly rely on market forces for the solution.

B. Scenario II: Rational Firms and Bounded Rational Consumers

If firms are relatively more rational than consumers, then firms can compete to exploit or help consumers with bounded rationality and willpower. Consumers with bounded willpower sacrifice their long-term interests (such as increased savings) for immediate consumption (and increased debt),[110] and display time-inconsistent preferences.[111] When the activity involves immediate costs and delayed benefits (e.g., exercising, studying), consumers procrastinate.[112] When the activity involves immediate benefits

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[109] *See* U.S. DEP'T OF JUSTICE, ANTITRUST DIV., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 7 (Oct. 2004), *available at* http://www.justice.gov/atr/public/guidelines/205108.pdf (stating that structural remedies in merger cases are preferred as "they are relatively clean and certain, and generally avoid costly government entanglement in the market"); Louis D. Brandeis, Address before the New England Dry Goods Association at Boston (Feb. 11, 1908), *in* THE SOCIAL AND ECONOMIC VIEWS OF MR. JUSTICE BRANDEIS 386, 386 (Alfred Lief ed., 1930) (observing how accepting mergers to monopolies with behavioral safeguards is like "surrendering liberty and substituting despotism with safeguards").

[110] *See* Ned Welch, *A Marketer's Guide to Behavioral Economics*, MCKINSEY Q., Feb. 2010, *available at* http://www.mckinseyquarterly.com/A_marketers_guide_to_behavioral_economics_2536.

[111] *See* Samuel M. McClure et al., *Separate Neural Systems Value Immediate & Delayed Monetary Rewards*, SCI., Oct. 15, 2004, at 504 (noting how if someone offered $10 today versus $11 tomorrow, a person would be tempted to choose the former; whereas if present choice involved a distant payoff ($10 in a year from now versus $11 in a year and a day from now), same person would likely choose the latter).

[112] *See generally* Ted O'Donoghue & Matthew Rabin, *Doing it Now or Later*, 89 AM. ECON. REV. 103 (1999) (discussing welfare implications of a sophisticated person, who knows exactly what her future self's preferences will be, and naïve person, who believes her future self's preferences will be identical to her current self's, not realizing that as she gets closer to executing decisions her tastes will change).

and delayed costs, consumers find it harder to delay gratification.[113]

Behavioral economics, commented one of its pioneers, uses scientific methods to explore human behavior already known to "advertisers and used-car salesmen."[114] Rational firms manipulate consumption decisions by:

> (i) using framing effects and changing the reference point, such that the price change is viewed as a discount, rather than a surcharge;[115]
>
> (ii) anchoring consumers to an artificially high suggested retail price, from which bounded rational consumers negotiate;[116]
>
> (iii) adding decoy options (such as a restaurant's adding a higher priced wine) to steer consumers to higher margin goods and services;[117]

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[113] *Id.* at 109-10 (using example of seeing a mediocre film this weekend rather than waiting to see a better film released several weeks later).

[114] GARY BELSKY & THOMAS GILOVICH, WHY SMART PEOPLE MAKE BIG MONEY MISTAKES—AND HOW TO CORRECT THEM: LESSONS FROM THE NEW SCIENCE OF BEHAVIORAL ECONOMICS 23 (1999) (quoting Amos Tversky).

[115] The way the choice is framed—such as a sure gain or avoiding a loss—can significantly impact the outcome of the consumers' choice. Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449, 1458 (2003). Consumers may be less concerned with the elimination of a discount than a price increase (although both have the same net effect). Thus, deviations from the perceived reference point may be marked by asymmetric price elasticity: consumers may be more sensitive to (and angry about) price increases than when the manufacturer eliminates a discount or does not reduce prices during periods of deflation.

[116] In one experiment, MBA students put down the last two digits of their social security number (e.g., 14). The students, then participants, monetized it (e.g., $14), and then answered for each bidded item "Yes or No" if they would pay that amount for the item. The students then stated the maximum amount they were willing to pay for each auctioned product. Students with the highest ending SSN (80-99) bid the highest and those with the lowest SSN (1-20) bid the lowest, and those with highest-ending SSN bid 216 to 346 percent higher than students with low-end SSNs. DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 25-28 (2008).

[117] Similarly, people "rarely choose things in absolute terms," but instead based on their relative advantage to other things. *Id.* at 2. As Ariely discusses, by adding a third more expensive choice, for example, the marketer can steer consumers to a more

(iv) using the sunk cost fallacy to remind bounded rational consumers of the financial commitment they already made to induce them to continue paying installments on an item, whose value is less than the remainder of payments;[118]

(v) using the availability heuristic[119] to drive purchases, such as an airline travel insurer using an emotionally salient death (from "terrorist acts") rather than a death from "all possible causes";[120]

(vi) taking advantage of the focusing illusion in advertisements (i.e., consumers predicting greater personal happiness from consumption of the advertised good and not accounting one's adaptation to the new product);[121]

(vii) giving the impression that their goods and services are of better quality because they are higher priced;[122] and

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expensive second choice. *Id.* MIT students, in one experiment, were offered three choices for the *Economist* magazine: (i) Internet-only subscription for $59 (sixteen students); (ii) print-only subscriptions for $125 (no students); and (iii) print-and-Internet subscriptions for $125 (eighty-four students). *Id.* at 5. When the "decoy" second choice (print-only subscriptions) was removed and only the first and third options were presented, the students did not react similarly. *Id.* at 5-6. Instead sixty-eight students opted for Internet-only subscriptions for $59 (up from sixteen students) and only thirty-two students chose print-and-Internet subscriptions for $125 (down from eighty-four students). *Id.* at 5-6.

[118] Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 792 (2006).

[119] Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, SCI., Sept. 27, 1974, at 1127 (noting situations where people assess the "frequency of a class or the probability of an event by the ease with which instances or occurrences can be brought to mind").

[120] *See generally* Eric J. Johnson et al., *Framing, Probability Distortions, and Insurance Decisions*, 7 J. RISK & UNCERTAINTY 35 (1993).

[121] *See* BELSKY & GILOVICH, *supra* note 114, at 225.

[122] Ariely, for example, conducted several experiments that revealed the power of higher prices. ARIELY, *supra* note 116, at 181-86. In one experiment, nearly all the participants reported less pain after taking a placebo priced at $2.50 per dose; when the placebo was discounted to $0.10 per dose, only half of the participants experienced less pain. *Id.* at 182-83. Similarly, MIT students who paid regular price for the "SoBe Adrenaline Rush" beverage reported less fatigue than the students who paid one-third of regular price for the same drink. *Id.* at 184-85. SoBe Adrenaline Rush beverage was next promoted as energy for the students' mind, and students after drinking the placebo, had to solve as many word puzzles as possible within thirty minutes. Students who paid regular price for the drink got on average nine correct responses, versus

(viii) seeking to avoid price competition through branding.[123]

Credit card issuers, as one example, can capitalize on this bounded rationality and willpower in two ways. First, they can compete in ways to encourage consumers to charge more and incur greater debt (and maximize fees for the banks).[124] Second, credit card issuers can compete in helping consumers achieve their long-term interests by providing them with commitment devices. Every day, for example, people have part of their salaries automatically deducted into separate investment accounts, hire personal trainers to ensure they exercise, or set their clocks slightly fast. Banks accordingly can help consumers increase personal savings by offering them credit cards designed toward that end. Consumers in their dispassionate state, for example, can elect to

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students who paid a discounted price for the same drink got on average 6.5 questions right. *Id.* at 185-86. Similarly, according to researchers at the Stanford Graduate School of Business and the California Institute of Technology:

> [I]f a person is told he or she is tasting two different wines—and that one costs $5 and the other $45 when they are, in fact, the same wine—the part of the brain that experiences pleasure will become more active when the drinker thinks he or she is enjoying the more expensive vintage.

News Release, Stanford Univ. News Serv., Price Tag Can Change the Way People Experience Win, Study Shows (Jan. 15, 2008), *available at* http://news-service.stanford.edu/pr/2008/pr-wine-011608.html; *see also* Jonathan D. Glater & Alan Finder, *In Tuition Game, Popularity Rises With Price*, N.Y. TIMES, Dec. 12, 2006, at A1 *available at* http://www.nytimes.com/2006/12/12/education/12tuition.html?pagewanted=print (discussing how Ursinus College, believing it was losing applicants because of its low tuition, raised its tuition and fees 17.6% in 2000 (but offered more financial aid) and received nearly 200 more applications the following year).

[123] Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q.J. ECON. 1039, 1054-58 (1991). A famous antitrust example is Clorox, whose bleach is chemically indistinguishable from rival brands. FTC v. Procter & Gamble Co., 386 U.S. 568 (1967). Nonetheless, Clorox invested millions of dollars in promoting its brand of bleach, and often charged a higher price for its bleach. One would think that a market, where one company sells a fungible chemically indistinguishable product at a price premium, would be attractive for potential entrants. But Procter & Gamble sought to purchase Clorox rather than enter the liquid bleach market independently. And Clorox bleach, according to the company website, remains today the U.S. industry leader with eight out of ten American households using the brand. *About Clorox*, CLOROX, http://www.clorox.com/about-us/ (last visited Nov. 1, 2011).

[124] Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 56 (2008) ("[D]ata on credit choice and use show that consumer mistakes cost hundreds of dollars a year per consumer.").

cap subsequent credit card purchases for certain categories of goods or services (e.g., limiting spending on Starbucks coffee to $5 per week).[125]

At times, exploiting irrationality benefits society. Rational firms can dampen investors' speculation (e.g., buying a company's stock on the hope that past price increases will continue with future price increases). Predictions markets can be construed as a form of behavioral exploitation. These predictions markets typically have a defined event (e.g., the winner of the U.S. presidential elections) and an end date when all bets are settled. Each market participant possesses partial knowledge. Moreover, some participants may be overly optimistic about the predicted outcome. Rational investors can exploit this irrationality, and the prediction market as a result can yield remarkably accurate predictions.[126]

Under Scenario II, firms may not always exploit consumers. Firms may be unable to *identify* those consumers whose biases, heuristics, and willpower make them more vulnerable. Identifying instances where bounded rationality can be exploited can be a business unto itself.[127] Rational firms can target bounded rational consumers by offering to help them with their earlier problems, such as selling their time shares, preventing home foreclosures, or improving their credit rating.

But rational firms, even after identifying bounded rational consumers, cannot always exploit them. Consumers, recognizing their bounded rationality, can turn to rational advisors or consumer advocates (such as *Consumers Reports*). Many markets, unlike prediction markets, lack a defined end-point. A rational investor could "short" a company's stock to profit when the stock

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[125] *See* Ron Lieber, *Your Card Has Been Declined, Just as You Wanted*, N.Y. TIMES, Aug. 13, 2010, at B1, *available at* http://www.nytimes.com/2010/08/14/your-money/credit-and-debit-cards/14money.html?src=me&ref=business.

[126] *See* Colin F. Camerer & Ernst Fehr, *When Does "Economic Man" Dominate Social Behavior?*, SCI., Jan. 6, 2006, at 47, 52; *see also* HAYEK, *supra* note 60, at 91.

[127] Bar-Gill & Warren, *supra* note 124, at 23-24. Credit rating agency Equifax, for example, advertises "'advanced profiling techniques' to identify people who show a 'statistical propensity to acquire new credit' within [ninety] days." Brad Stone, *Banks Mine Data and Woo Troubled Borrowers*, N.Y. TIMES, Oct. 21, 2008, at B1, *available at* http://www.nytimes.com/2008/10/22/business/22target.html?_r=1.

price declines.[128] But rational traders often do not know when the speculative bubble will burst. Rational traders, due to investor pressure, can be subject to short-term horizons, and follow the herd for short-term gains.[129] Rational traders may also make more money by creating products that encourage, rather than deter, speculation.[130]

Alternatively, consumers, recognizing their bounded rationality, can turn to rational advisors or consumer advocates (such as *Consumers Reports*). Moreover the window for exploitation can be short-lived. Consumers can make better decisions as they gain experience, receive feedback quickly on their earlier errors, and discover some of the biases and heuristics in their earlier decisions.[131]

Scenario II competition presents other forms of market failure. One is systemic behavioral exploitation.[132] In competitive markets, one expects rational firms to inform bounded rational consumers of other firms' attempts to exploit them. Providing this information is another facet of competition—trust us, we will not

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[128] *See* The Motley Fool, *The Fool FAQ: Shorting Stocks*, FOOL.COM, http://www.fool.com/FoolFAQ/FoolFAQ0033.htm (last visited Nov. 1, 2011) ("An investor who sells stock short borrows shares from a brokerage house and sells them to another buyer. Proceeds from the sale go into the shorter's account. He must buy those shares back (cover) at some point in time and return them to the lender.").

[129] Andrei Shleifer & Robert W. Vishny, *The Limits of Arbitrage*, 52 J. FIN. 35 (2007); *see also* James Mackintosh, *Decoding the Psychology of Trading*, FIN. TIMES, July 16, 2010, at 15 (discussing how hedge funds seek to exploit investors' bounded rationality by monitoring investor sentiments in the press), *available at* http://www.ft.com/intl/cms/s/0/7332e44a-9109-11df-b297-00144feab49a.html#axzz1cqvXVO8i; CASSIDY, *supra* note 86, at 177-81.

[130] ANDREI SHLEIFER, INEFFICIENT MARKETS: AN INTRODUCTION TO BEHAVIORAL FINANCE 172 (2002) (citing several examples, including future contracts on tulips during the Tulipmania of the 1630s); CASSIDY, *supra* note 86, at 182-84.

[131] John A. List, *Does Market Experience Eliminate Market Anomalies?*, 118 Q.J. ECON. 41, 41 (2003).

[132] Max Huffman, *Bridging the Divide? Theories for Integrating Competition Law and Consumer Protection*, 6 EUR. COMPETITION J. 7, 17-18 (2010) (discussing how behavioral exploitation may produce longer-lasting consumer harm). Prof. Huffman's article prompted an interesting roundtable discussion among competition law lawyers, economists, and policy officials. *Antitrust Marathon IV: With Authority—A Discussion Led by Philip Marsden and Spencer Weber Waller*, 6 EUR. COMPETITION J. 1, 1-127 (2010).

exploit you.[133] But too frequently, rather than compete to build consumers' trust in their business, competitors engage in similar exploitation.[134]

Rational firms can compete in finding cleverer ways to attract and exploit bounded rational consumers. The U.K.'s Office of Fair Trading recently experimented with five common price frames: (i) "drip pricing," where a lower price is initially disclosed to the consumer and additional charges are added as the sale progresses; (ii) "sales," where the "sales" price is referenced off an inflated regular price (e.g., was $2, now $1); (iii) "complex pricing" (e.g., three-for-two offers), where the unit price requires some computation; (iv) "baiting," where sellers promote special deals with only a limited number of goods available at the discounted price; and (v) "time limited offers," where the special price is

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[133] *See* SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 965 (10th Cir. 1994) ("If the structure of the market is such that there is little potential for consumers to be harmed, we need not be especially concerned with how firms behave because the presence of effective competition will provide a powerful antidote to any effort to exploit consumers." (quoting George A. Hay, *Market Power in Antitrust*, 60 ANTITRUST L.J. 807, 808 (1992))).

[134] *See, e.g.*, Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 474 n.21 (1992) (noting that "in an equipment market with relatively few sellers, competitors may find it more profitable to adopt Kodak's service and parts policy than to inform the consumers"); FTC v. R.F. Keppel & Bro., Inc., 291 U.S. 304, 308, 313 (1934) (finding that while competitors "reluctantly yielded" to the challenged practice to avoid loss of trade to their competitors, a "trader may not, by pursuing a dishonest practice, force his competitors to choose between its adoption or the loss of their trade"); Ford Motor Co. v. FTC, 120 F.2d 175, 179 (6th Cir. 1941) (Ford following industry leader General Motors in advertising a deceptive six-percent financing plan); Matthew Bennett et al., *What Does Behavioral Economics Mean for Competition Policy?*, 6 COMPETITION POL'Y INT'L 111, 118 (2010); Eliana Garcés, *The Impact of Behavioral Economics on Consumer and Competition Policies*, 6 COMPETITION POL'Y INT'L 145, 150 (2010); Huffman, *supra* note 132. Antitrust scholar Robert Steiner, who was also the former president of the Kenner Products toy company, described his concerns about the industry self-regulation of toy commercials in the 1960s and 1970s. Originally favoring industry self-policing, he feared the greater anticompetitive consequences of deceptive advertising. Absent regulation, some toy manufacturers would air deceptive ads, which would pull down the toy industry. Unless his company matched "the exaggerations and sometimes the outright deceptions of certain competitors, our commercials might not be exciting enough to move our toys off the shelves." He foresaw bad commercials driving out the good ones, rendering television advertising relatively ineffective. Robert L. Steiner, *Double Standards in the Regulation of Toy Advertising*, 56 U. CIN. L. REV. 1259, 1264 (1988).

available for a short period.[135] The OFT experiment found how firms can manipulate consumer consumption behavior and leave them worse off, especially under drip pricing and time-limited offers. Not surprisingly one sees exploitive "drip pricing" for airline tickets,[136] car rentals,[137] and prepaid telephone calling cards.[138]

To exploit consumers, rational firms can compete in ways to reduce price transparency and increase the complexity of their products (or product terms).[139] Credit cards are one example. A single credit card account can have multiple APRs for different

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[135] OFFICE OF FAIR TRADING, THE IMPACT OF PRICE FRAMES ON CONSUMER DECISION MAKING 6 (May 2010), *available at* http://www.oft.gov.uk/shared_oft/economic_research/OFT1226.pdf.

[136] The airlines are clever in their surcharges for pieces and weight of luggage, phone reservation fees, meals, beverages, headsets, extra legroom, etc. These extra fees often are not quoted in the initial price displayed to customers but later when consumers are completing their purchase. *See e.g.*, Alex Altman & Kate Pickert, *New Airline Surcharge: A Bag Too Far?*, TIME, May 22, 2008, *available at* http://www.time.com/time/business/article/0,8599,1808804,00.html; Jad Mouawad & Claire Cain Miller, *Search for Low Airfares Gets More Competitive*, N.Y. TIMES, Feb. 10, 2011, at B1, *available at* http://www.nytimes.com/2011/02/11/business/11air.html.

[137] *In re* Dollar Rent-A-Car Sys., Inc., 116 F.T.C. 255 (1993) (requiring Dollar to disclose to consumers in its ads the existence of any mandatory fuel charges, airport surcharges or other charges not reasonably avoidable by consumers); *In re* Value Rent-A-Car, Inc., 116 F.T.C. 245 (1993) (same); *In re* Gen. Rent-A-Car Sys., Inc., 111 F.T.C. 694 (1989) (requiring national car rental company to disclose charges that are mandatory or are not reasonably avoidable to every consumer that inquires about prices); *In re* Alamo Rent-A-Car, Inc., 111 F.T.C. 644 (1989) (settling charges that its operators failed to disclose to consumers the existence and amount of airport surcharges and mandatory fuel charges when consumers inquire about possible rental of Alamo's vehicles).

[138] Bennett et al., *supra* note 134, at 117.

[139] *See, e.g.*, Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q.J. ECON. 505, 505-08 (2006); Edward J. Janger & Susan Block-Lieb, *Consumer Credit and Competition: The Puzzle of Competitive Credit Markets*, 6 EUR. COMPETITION J. 68, 71 (2010) ("Price competition often takes the form of price concealment."); Bar-Gill & Warren, *supra* note 124, at 27-28; JOHNSON & KWAK, *supra* note 7, at 81, 108. Visa, MasterCard, and American Express, the DOJ recently alleged, sought to reduce price transparency for their credit card network services. Complaint for Equitable Relief for Violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 at 2-3, United States v. Am. Express Co., No. CV 10-4496, 2010 WL 3836766 (E.D.N.Y Oct. 4, 2010) (alleging that merchants were prohibited from informing consumers of the merchants' cost in using a particular credit card network, or to encourage the customer to use a less costly credit card or payment method). Visa and MasterCard subsequently settled with the DOJ.

types of credit extensions or that apply for limited time periods. General purpose credit card issuers can compete by reducing "front-end" costs, such as eliminating annual fees and substantially discounting initial interest rates. Consumers, ill-informed about the long-term costs of different credit cards, can make decisions on incidental benefits (such as receiving a T-shirt with the university logo when signing up for a credit card on a college campus). The credit card companies then overcharge the consumer on the less salient "back-end" costs, with higher late fees and penalties and over-the-credit-limit fees.[140] At times, consumers are disclosed the information but do not understand the key terms that affect the cost of using their credit card; at other times, consumers simply do not act on the information.[141]

Rational companies can exploit consumers' optimism bias. One former CEO, for example, explained how his credit card company targeted low-income customers "by offering 'free' credit cards that carried heavy hidden fees."[142] The former CEO explained how these ads targeted consumers' optimism: "When people make the buying decision, they don't look at the penalty fees because they never believe they'll be late. They never believe they'll be over limit, right?"[143] Consumers are overoptimistic on their ability and willpower to pay off the credit card purchases timely. They underestimate the costs of their future borrowings.[144] So, the optimistic consumers choose credit cards with lower annual fees (but higher financing fees and penalties)

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[140] *See* Press Release, Bd. of Governors of the Fed Reserve Sys., Statement by Chairman Ben S. Bernanke (May 2, 2008), *available at* http://www.federalreserve.gov/newsevents/press/bcreg/bernankecredit20080502.htm.

[141] *See* JAMES M. LACKO & JANIS K. PAPPALARDO, *Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms*, FTC.GOV (June 2007), http://www.ftc.gov/os/2007/06/P025505MortgageDisclosureReport.pdf.

[142] *FRONTLINE: The Card Game*, (Nov. 24, 2009), *available at* http://www.pbs.org/wgbh/pages/frontline/creditcards/view/ (interview with former Providian CEO Shailesh Mehta).

[143] *Id.*

[144] *See* Sha Yang et al., *Unrealistic Optimism in Consumer Credit Card Adoption*, 28 J. ECON. PSYCHOL. 170 (2007); JOHNSON & KWAK, *supra* note 7, at 196-97.

over better suited products (e.g., credit cards with higher annual fees but lower interest rates and late payment penalties).[145]

For other competitors, it may make sense to exploit consumer biases rather than incur the costs to debias. Suppose a credit card issuer incurs the cost to educate consumers of their bounded willpower and overconfidence. Other competitors can free-ride on the company's educational efforts and quickly offer similar credit cards with lower annual fees. Ultimately, such competition would reduce the credit card industry's profits, without offering any lasting competitive advantage to the first-mover.[146] Consequently, the industry is better off exploiting consumers' bounded rationality. Consumers, overconfident in their financial prowess, will not demand better-suited products. Firms have little financial incentive to help consumers make better choices.[147] Market demand, accordingly, will skew toward products and services that exploit or reinforce the consumers' bounded willpower and rationality.

1. Scenario II's Policy Risks Assuming the Government Is Rational

Customers under this scenario may reign supreme (in choosing commitment devices to address their bounded rationality and willpower) or be exploited. So, in distinguishing between behavioral exploitation and when firms are helping bounded rational consumers, the government under Scenario II faces two difficulties.

One difficulty is that the government cannot necessarily rely on consumers' choices to infer their utility. Economists historically assessed people's preferences, not by their subjective beliefs or intentions, but by their actual choices.[148] But if heuristics and

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[145] Bar-Gill & Warren, *supra* note 124, at 46.

[146] *Id.* at 8-9, 20-21.

[147] *See, e.g.*, HORIZONTAL MERGER GUIDELINES, *supra* note 61, at § 7.2 (noting how the market is more vulnerable to coordinated conduct if a firm that first offers a lower price or improved product to customers will retain relatively few customers after its rivals respond).

[148] *See Revealed Preference Definition*, ECONOMIST.COM, http://www.economist.com/economics-a-to-z/r#node-21529779 (last visited Nov. 1, 2011) ("To model demand it is only necessary to be able to compare an individual's consumption decisions in

biases systematically appear in consumer decision-making, then consumer choices do not necessarily reflect their actual preferences.[149] Bounded rational consumers can predict poorly as to what makes them happy.[150] At times, firms manipulate consumer choices through advertising and promotions.[151]

A second difficulty is that some sophisticated consumers, aware of their bounded rationality and willpower, will incur costs on commitment devices that could appear to a rational government as exploitative. Take for example Christmas club savings accounts. Bank customers deposit throughout the year into their Christmas accounts (which do not offer superior interest rates) and cannot withdraw the funds until the holidays. A rational government official could view Christmas accounts as exploitative. Customers get less (in terms of interest rate and liquidity). Banks get more (longer time horizon to use funds without risk of withdrawals). Rational consumers with willpower would chose risk-free illiquid funds with better yields (e.g., Certificates of Deposit) or keep the funds in their savings accounts. But Christmas accounts provide bounded rational consumers with a commitment device and divisibility (namely a separate account earmarked for Christmas shopping).[152]

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situations with different prices and/or incomes and to assume that consumers are consistent in their decisions over time (that is, if they prefer wine to beer in one period they will still prefer wine in the next).").

[149] *See* Bruno S. Frey & Alois Stutzer, *What Can Economists Learn from Happiness Research?*, 40 J. ECON. LITERATURE 402, 404-05 (2002); Daniel Kahneman & Alan B. Krueger, *Developments in the Measurement of Subjective Well-Being*, 20 J. ECON. PERSP. 3, 3-4 (2006) ("If people display bounded rationality when it comes to maximizing utility, then their choices do not necessarily reflect their 'true' preferences, and an exclusive reliance on choices to infer what people desire loses some of its appeal."); George Loewenstein & Peter A. Ubel, *Hedonic Adaptation and the Role of Decision and Experience Utility in Public Policy*, 92 J. PUB. ECON. 1795 (2008); Garcés, *supra* note 134, at 148.

[150] *See* Daniel Kahneman & Richard H. Thaler, *Utility Maximization & Experienced Utility*, 20 J. ECON. PERSP. 221 (2006); Daniel Kahneman et al., *Would You Be Happier If You Were Richer? A Focusing Illusion*, SCI., June 30, 2006, at 1908; David A. Schkade & Daniel Kahneman, *Does Living in California Make People Happy?*, 9 PSYCHOL. SCI. 345 (1998).

[151] *See* DEREK BOK, THE POLITICS OF HAPPINESS 76, 115-17, 206 (2010); JOHN KENNETH GALBRAITH, THE AFFLUENT SOCIETY (2d ed. 1998).

[152] Richard H. Thaler, *Mental Accounting Matters*, *in* ADVANCES IN BEHAVIORAL ECONOMICS 75 (Colin F. Camerer et al. eds., 2004).

Thus, a key issue under Scenario II is how the rational government identifies and responds to sustained behavioral exploitation. Authoritarianism and corporate autocracy are two worst-case scenarios.

Under a market economy, consumers, through their informed economic decisions, should ultimately reign supreme. But if bounded rational consumers choose poorly, one danger is that the rational government by default decides for consumers. If consumers are bounded rational, the justification goes, markets are not functioning as efficiently as they could be; thus the state becomes the de facto guardian to protect its citizens from their irrationality. But a heightened concern about consumers' bounded rationality raises far greater social and political concerns over consumer sovereignty and "the intrusion of bureaucracy into all spheres of human life and activity."[153] The concern over behavioral exploitation can increasingly justify "the subordination of every individual's whole life, work, and leisure to the orders of those in power and office."[154]

In displacing individual autonomy, the rational government does not help consumers improve their willpower or rationality. Instead the government promotes learned helplessness. The government devotes greater energies to regulate marketplace behavior and displace the market's function in finding solutions for consumers' problems.[155] The government devises ways to improve consumers' diets and limit the consumption of unhealthy products. Next, the government encourages citizens to use their leisure time more productively, such as exercising and reading, rather than watching television.[156]

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[153] MISES, *supra* note 66, at 14.

[154] *Id.* at 17.

[155] *See* J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, Intel, Apple, Google, Microsoft, and Facebook: Observations on Antitrust and the High-Tech Sector, Address at the ABA Antitrust Section Fall Forum (Nov. 18, 2010), *available at* http://www.ftc.gov/speeches/rosch/101118fallforum.pdf (recognizing "strong argument that having the state call the shots respecting consumer choice not only defeats the outcome that market forces would dictate, but also smacks of the kind of 'central planning' characteristic of a totalitarian state").

[156] *See* MISES, *supra* note 66, at 22.

The concern is creeping authoritarianism. To protect its citizens, the government places greater restrictions on the citizens' ability to manage their affairs. A bureaucracy that exists to protect its bounded rational citizens does not have much incentive to improve the citizens' bounded rationality and willpower. The bureaucrats' livelihood, authority, and status depend on citizens remaining sufficiently irrational to justify the bureaucracy's existence.[157] Consumers are encouraged to register their complaints with the government, who intercedes on their behalf. The consumer complaints justify additional regulations to deter behavioral exploitation. Inevitably, the heavily regulated firms become de facto state enterprises. As Hayek observed, "planning leads to dictatorship, because dictatorship is the most effective instrument of coercion and the enforcement of ideals and, as such, essential if central planning on a large scale is to be possible."[158]

Under this worst-case scenario, economic competition ceases to be a concern. A centrally-planned economy headed by an authoritarian government eventually displaces experimentation by private firms and personal liberty. Thus some accept the cost of behavioral exploitation versus the greater costs of losing economic freedom to an increasingly authoritarian government.[159]

But if the government takes a laissez-faire approach and renounces any intention to regulate the market, this raises the other worst-case scenario, namely corporate autocracy. Here the outcome is equally anti-democratic. Economically powerful firms lobby the government to refrain from regulating the marketplace. While economically exploiting bounded rational consumers, firms advocate the virtues of consumer sovereignty under a laissez-faire

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[157] NORTH, *supra* note 41, at 51-52.

[158] F.A. HAYEK, THE ROAD TO SERFDOM 70 (U. Chi. Press 2007) (1944).

[159] One need only look at China's dismal experience under Mao Zedong's authoritarian regime. FENBY, *supra* note 79, at 525 (besides the human losses and suffering, estimating the economic cost of the Cultural Revolution at the equivalent of $34 billion). In defending the economic liberalizations in China's Special Economic Zones, one Chinese official queried how many state officials would be willing to live in a zone where leftist policies would be applied through "total state planning, rationing and queuing for food, where foreign investment and foreigners would be banned, and inhabitants would not be allowed to travel or send their children abroad." *Id.* at 648.

approach. Under this ideology, markets are presumably efficient (or heading toward greater efficiency). Once economic power and wealth are concentrated, the government and its competition policies are used to preserve the status quo.[160] The dominant firms maintain their power by redefining the goals of competition policy. Antitrust enforcement is directed against any potential countervailing power (such as using the antitrust laws to prosecute unions, which happened early in the Sherman Act's history[161]). Antitrust policy characterizes concentration, even to the brink of monopoly, as beneficial.[162] Political and social concerns over dominant firms' influence and the effect of their size on the economy as a whole are dismissed as ill-founded fears over bigness and prosperity. These non-economic antitrust goals are deemed out of touch with the latest economic thinking, premised on rational choice theory.[163] Once economic and political power is consolidated, monopolies and cartels can become "governmental instrumentalities to achieve political ends."[164] Citizens are denied the right to use the democratic process to protect them; instead

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[160] Industries in pre-war Germany, for example, enlisted the state through compulsory cartel laws to complete their market power. Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 521-25 (providing examples); John M. Kleeberg, *German Cartels: Myths and Realities* 2 (N.Y.U Working Paper), *available at* http://www.econ.barnard.columbia.edu/~econhist/papers/Kleeberg_German_Cartels.pdf (estimating that 550 to 600 German cartels existed in 1911, about 1,000 in 1922; 1,500 by 1933; and 1,800 by 1938); HAYEK, *supra* note 158, at 93-94; *see also* JOHNSON & KWAK, *supra* note 7, at 6 (discussing financial industry).

[161] The eighth federal antitrust action brought by the United States was against Eugene V. Debs. COMMERCE CLEARING HOUSE, THE FEDERAL ANTITRUST LAWS: WITH SUMMARY OF CASES INSTITUTED BY THE UNITED STATES 1890-1951, at 69 (1952). The United States prosecuted numerous unions and union officials. *Id.* at 459-60 (index of cases against unions); *see also* PAUL E. HADLICK, CRIMINAL PROSECUTIONS UNDER THE SHERMAN ANTI-TRUST ACT 140 (1939) (observing that the first persons to serve jail sentences resulting from Sherman Act violations were Eugene V. Debs and others, stemming from the Pullman strike of 1894).

[162] Verizon Commc'n Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (praising monopoly profits as "an important element of the free-market system," in serving as an inducement to "attract[] 'business acumen' in the first place" and engage in "risk taking that produces innovation and economic growth").

[163] Darren Bush, *Too Big to Bail: The Role of Antitrust in Distressed Industries*, 77 ANTITRUST L.J. 277, 281-91 (2010).

[164] John H. Crider, *Roosevelt Calls for Cartels Curb: In Letter to Hull He Says Types of 'Trusts' Used by Reich Must Be Ended*, N.Y. TIMES, Sept. 9, 1944, at A1 (quoting President Roosevelt).

they navigate the market's dark alleyways, hoping that little economic harm comes to them.

2. Scenario II's Policy Risks Assuming the Government Is Bounded Rational

The prospect of bounded rational consumers and government raises several additional policy risks. One risk is that competitors may use consumer protection as a pretext for their anticompetitive restraints. To "protect" consumers from making irrational decisions, competitors agree to compete only along some parameters, such as quality or service, rather than price. In *National Society of Professional Engineers v. United States*, for example, the competing engineers refused "to discuss prices with potential customers until after negotiations . . . resulted in the initial selection of an engineer."[165] The society claimed that if engineers discussed prices at the onset with prospective clients, low bids would result. This in turn would tempt individual engineers to do inferior work with consequent risk to public safety and health. The engineers' behavior, when characterized favorably, was paternalistic. Customers, the engineers argued, could not account all the variables involved in the projects' actual performance.[166] The Supreme Court rejected the engineers' justification.[167] But the bounded rational government, assuming that bounded rational consumers choose poorly, might accept it. The rational competitors may also enlist the government to enforce their cartel.[168]

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[165] 435 U.S. 679, 692 (1978).

[166] *Id.* at 694 (engineers arguing that customers could not intelligibly decide whether its "interest in quality—which may embrace the safety of the end product—outweighs the advantages of achieving cost savings by pitting one competitor against another").

[167] *Id.* at 695 (recognizing its inability (and its lack of authority under the Sherman Act) to weigh the loss of price competition with the public benefit of preventing inferior engineering work and insuring ethical behavior, and characterizing engineers' justifications as "nothing less than a frontal assault on the basic policy of the Sherman Act"); *see also* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 463 (1986) (rejecting defense that in competitive information market consumers will "make unwise and even dangerous choices").

[168] An agency empowered by the government to regulate an industry can be more effective than a private cartel in maintaining a cartel. In *United States v. Kentucky*

Another policy risk arises from the overconfidence bias. Citizens are overconfident in the government's ability to regulate the market for abuses.[169] The bounded rational government is overconfident in its citizens' ability to fend for themselves[170] and the ability of markets to self-correct.

A third policy risk is that the bounded rational government causes greater harm in protecting bounded rational consumers. For example, after a recent disaster, bounded rational consumers and the government under the availability heuristic would overestimate the probability of that disaster recurring. The government overregulates the industry, while not addressing other less salient dangers that actually cause greater harm.[171] Even without the government's help, bounded rational consumers

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Real Estate Commission, the defendant served as the sole licensing authority for the state's real estate brokers. Complaint at 12, United States v. Kentucky Real Estate Comm'n, No. 3:05CV188-H (W.D. Ky. Mar. 31, 2005), *available at* http://www.usdoj.gov/atr/cases/f208300/208393.pdf. Four of the five commissioners were, as required by statute, active real estate brokers. The defendant banned brokers from offering homebuyers a cash rebate, such as $1,000, or an inducement, like a free television, if the buyer used that broker. To enforce its anticompetitive rebate ban, the defendant investigated alleged violations, asked real estate brokers to inform it when any competing brokers offered rebates or other inducements, and took disciplinary action against brokers who offered customers rebates or other inducements, including suspending or revoking brokers' licenses, imposing monetary fines, issuing reprimands, and requiring completion of additional academic credit hours. *Id.* at 33.

[169] *See* FANNIE MAE, THE GROWING DEMAND FOR HOUSING: 2002 FANNIE MAE NATIONAL HOUSING SURVEY 9 (2002), *available at* http://www.fanniemae.com/global/pdf/media/survey/survey2002.pdf.

[170] For example, the Federal Trade Commission under the Reagan Administration limited Section 5 liability of unfair practices to injuries, which consumers could not reasonably have avoided. FTC Policy Statement on Unfairness, Appended to *In re* Int'l Harvester Co., 104 F.T.C. 949, 1070 (1984). As the FTC stated:

> Normally we expect the marketplace to be self-correcting, and we rely on consumer choice—the ability of individual consumers to make their own private purchasing decisions without regulatory intervention—to govern the market. We anticipate that consumers will survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory.

Id. The FTC Statement however recognized some forms of behavioral exploitation, such as when firms "exercise undue influence over highly susceptible classes of purchasers, as by promoting fraudulent 'cures' to seriously ill cancer patients." *Id.*

[171] Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 747-48 (1999).

can overreact, based on how the issue is framed[172] or to rumors, causing social losses, a concern China's authorities recently raised.[173]

3. Policy Alternatives under Scenario II

Consumers can be worse off when the government (whether rational or bounded rational) acts or does not act. So, what should the government do, especially if the extent of its bounded rationality is unknown?

The government has several options, some less paternalistic than others, to deter behavioral exploitation while preserving economic liberty and leaving room for innovation that benefits consumers.

One well-known behavioral remedy is for the government to alter existing, or create new, default rules.[174] One recent issue was that banks were exploiting credit card consumers' propensity to overspend their assigned credit limits. Suppose the consumer with bounded willpower sees designer-label shoes on the discount rack. The consumer has $20 of available credit; the shoes cost $100. The bank permits the consumer to charge the shoes, but extracts a high fee.[175] Overdraft fees are also an issue with debit

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[172] *See* Marwan Sinaceur et al., *Emotional and Deliberative Reactions to a Public Crisis: Mad Cow Disease in France*, 16 PSYCHOL. SCI. 247 (2005), *available at* http://faculty-gsb.stanford.edu/heath/documents/PsychSci-Mad%20Cow.pdf. The field study showed how French newspaper articles more often featured the emotional label "Mad Cow" disease than the more abstract and scientific label (Creutzfeldt-Jakob disease, CJD, or bovine spongiform encephalopathy, BSE). Beef consumption dropped "significantly when many articles mentioned the Mad Cow frame during the previous month, but was unaffected by the number of articles in the previous month that mentioned the scientific frames." *Id.* at 251.

[173] Hu Meidong & Peng Yining, *Chinese Lacking Scientific Literacy: Knowledge Crucial to Development and Stability*, CHINA DAILY, Nov. 2, 2010, at 4 (expressing concern over a three hundred percent price increase of mung beans since April 2010 after false claim that beans cure cancer).

[174] RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 78 (2008); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003); Camerer et al., *supra* note 11, at 1211.

[175] Marcy Gordon, *House Passes Credit Card Bill That Helps Consumers*, HUFFINGTON POST (May 1, 2009), http://www.huffingtonpost.com/2009/04/30/house-passes-credit-card-_n_194126.html. During the financial crisis, the major U.S. banks

cards, where the consumer makes a purchase for an amount greater than the balance in the consumer's bank account. In 2009, consumers paid a record $38.5 billion in overdraft fees, nearly double the amount reported in 2000.[176] Ninety-three percent of the overdraft revenues came from about fourteen percent of U.S. bank accounts, with the larger banks charging the highest fees.[177]

Rather than prohibit outright over-the-limit fees or regulate the size of such fees, Congress in the Credit CARD Act of 2009 chose a behavioral remedy and changed the default option.[178] Before 2010, many banks automatically enrolled consumers in their over-the-limit plan. Under the Act, the credit card company cannot impose an over-the-limit fee for any extension of credit in excess of the previously-authorized credit limit unless the consumer expressly opts into the over-the-limit plan.[179]

For rational actors with perfect willpower, the default option should not affect the outcome. But the majority of surveyed participants in the Federal Reserve's testing, along with "consumer advocates, members of Congress, federal and state

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raised fees further. Eric Dash, *Bank Fees Rise as Lenders Try to Offset Losses*, N.Y. TIMES, July 2, 2009, at B1, *available at* http://www.nytimes.com/2009/07/02/business/02fees.html.

[176] Saskia Scholtes & Francesco Guerrera, *Banks in $38.5bn Windfall from Fees*, FIN. TIMES, Aug. 10, 2009, *available at* http://www.ft.com/intl/cms/s/0/b359ffc0-8545-11de-9a64-00144feabdc0.html#axzz1cqvXVO8i.

[177] Ron Lieber & Andrew Martin, *The Card Game: Overspending on Debit Cards Is a Boon for Banks*, N.Y. TIMES, Sept. 9, 2009, at A1, *available at* http://www.nytimes.com/2009/09/09/your-money/credit-and-debit-cards/09debit.html.

[178] *See* Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, § 102(a), 123 Stat. 1734, 1738-39 (2009) [hereinafter Credit CARD Act]. With respect to debit cards, the Board of Governors of the Federal Reserve System amended Regulation E to limit the ability of a financial institution to assess an overdraft fee for paying automated teller machine (ATM) and one-time debit card transactions that overdraw a consumer's account, unless the consumer affirmatively consents, or opts in, to the institution's payment of overdrafts for these transactions. *New Overdraft Rules for Debit and ATM Cards*, BD. OF GOVERNORS OF THE FED. RESERVE SYS. (June 22, 2010), http://www.federalreserve.gov/consumerinfo/wyntk_overdraft.htm.

[179] Credit CARD Act § 102(a), *supra* note 178. This provision, like many other provisions of the Act, took effect in February 2010. *See id.* at § 3, 123 Stat. at 1735. One year after the default option changed, "overlimit fees have virtually disappeared in the credit card industry." *CARD Act Factsheet*, CONSUMER FIN. PROT. BUREAU (Feb. 2011), http://www.consumerfinance.gov/credit-cards/credit-card-act/feb2011-factsheet/ [hereinafter CFPB Factsheet].

regulators, and the overwhelming majority of individual consumers who commented" on the proposed regulation urged the Board to set the default as consumers having to opt into the overdraft program rather than having to opt-out (which many banks preferred).[180] Default options have played an important role in diverse settings,[181] including class actions,[182] and will likely be contested in other areas.[183]

As a second option, the government can require consumers to choose among the options. The European Commission, for example, challenged Microsoft for bundling or tying its web browser, Internet Explorer, to its dominant client personal computer operating system, Windows.[184] Before the settlement, consumers who used Windows had Microsoft's Internet Explorer as their default web browser. Although consumers could download other browsers, many did not, a function not attributable necessarily to the superiority of Microsoft's browser but status quo

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[180] *See* Electronic Funds Transfers, 12 C.F.R. Part 205 (2009), *available at* http://edocket.access.gpo.gov/2009/E9-27474.htm (Official staff commentary of the Board of Governors of the Federal Reserve System).

[181] *See, e.g.*, Stefano DellaVigna, *Psychology and Economics: Evidence from the Field*, 47 J. ECON. LITERATURE 315, 322 n.11 (2009) (collecting studies on default options in retirement savings, contractual choice in health-clubs, organ donation, and car insurance plan choice); Eric J. Johnson et al., *Defaults, Framing and Privacy: Why Opting In-Opting Out*, 13 MARKETING LETTERS 5 (2003) (consent to receive e-mail marketing); C. Whan Park et al., *Choosing What I Want Versus Rejecting What I Do Not Want: An Application of Decision Framing to Product Option Choice Decisions*, 37 J. MARKETING RES. 187 (2000) (car option purchases); THALER & SUNSTEIN, NUDGE, *supra* note 174, at 129-30.

[182] EUROPEAN CONSUMER CONSULTATIVE GRP., OPINION ON PRIVATE DAMAGES ACTIONS 4 (2010), *available at* http://ec.europa.eu/consumers/empowerment/docs/ECCG_opinion_on_actions_for_damages_18112010.pdf (noting Europe's recent experience that the rate of participation in opt-in procedure for consumer claims was less than one percent, whereas under opt-out regimes, rates are typically very high (97% in the Netherlands and almost 100% in Portugal)).

[183] *See* Julie Brill, Commissioner, Fed. Trade Comm'n, Remarks at the Trans Atlantic Consumer Dialogue 4 (Apr. 27, 2010), *available at* http://www.ftc.gov/speeches/brill/100427tacdspeech.pdf (expressing dissatisfaction with the "traditional opt-out, 'notice and choice' model" that "inappropriately places the burden on consumers to read and understand lengthy, complicated privacy policies that almost no one reads, and no one understands").

[184] Press Release, European Comm'n, Antitrust: Commission Welcomes Microsoft's Roll-Out of Web Browser Choice (Mar. 2, 2010), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/216&format=HTML&aged=0&language=EN.

bias.[185] As part of its settlement, Microsoft now provides consumers a Browser Choice Screen. Rather than having one Internet browser as the default, computer users must choose the browser they want from the competing web browsers listed on the screen.[186]

Third, the government can educate the consumers using framing under prospect theory[187] and the availability heuristic.[188] To increase the salience of credit card finance charges, for example, the Credit CARD Act of 2009 requires a "Minimum Payment Warning."[189] The credit card consumer is told in the

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[185] *See* Shane Frederick, *Automated Choice Heuristics*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 555 (Thomas Gilovich et al. eds., 2002) (summarizing experimental evidence of people preferring current options over other options to a degree that is difficult to justify).

[186] It is unclear how successful the settlement has been to date. On the one hand, Microsoft's share of the European browser market declined after the settlement—from 44.9% in January 2010 to 39.8% in October 2010. In 2009, Microsoft's share declined by 5.5 percentage points; in 2008, by 8 points. Kevin J. O'Brien, *European Antitrust Deal With Microsoft Barely Affects Browser Market*, N.Y.TIMES.COM (Oct. 10, 2010), http://www.nytimes.com/2010/10/11/technology/11eubrowser.html?ref=business. So, the market share could have declined absent the remedy. On the other hand, absent the remedy, by enabling consumers to easily chose which browser they desire, increases the likelihood that the market share reflects more the consumers' informed choice, rather than the monopolist's. Emanuele Ciriolo, *Behavioural Economics in the European Commission: Past, Present and Future*, OXERA AGENDA, Jan. 2011, at 3, *available at* http://www.oxera.com/main.aspx?id=9324 (noting how twenty-five percent of the consumers who viewed the choice screen chose an alternative browser).

[187] *See* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979).

[188] Camerer et al., *supra* note 11, at 1231 ("Since low probabilities are so difficult to represent cognitively, it may help to use graphical devices, metaphors (imagine choosing one ping-pong ball out of a large swimming pool filled with balls), or relative-odds comparisons (winning the lottery is about as likely as being struck by lightning in the next week).").

[189] Credit CARD Act, *supra* note 178, at § 201(a). One year later, the Consumer Financial Protection Bureau reports that "70 percent of cardholders [surveyed] have noticed that monthly statements now contain information about the consequences of making only minimum payments" and "48 percent of consumers recall that their bill now tells them how much to pay each month in order to pay off the balance within three years." CFPB Factsheet, *supra* note 179. "Of the cardholders who have noticed at least one of the changes in their monthly billing statements, 60 percent say that their monthly statements are easier to read and understand than they were a year ago" and "31 percent of cardholders who recall seeing the new information on their statement report that this information has caused them either to increase the payments they make or to reduce their use of credit." *Id.* However, "32 percent of those who carry a

monthly statement how paying only the minimum amount due will increase the amount of interest she pays and the time to repay the balance. At times, better disclosures entail providing less, but more important, information.[190]

A fourth option to deter behavioral exploitation is to set one option as the default but impose procedural constraints on opting out.[191] For example, the Credit CARD Act of 2009 sets as the default that "no credit card may be issued to, or open end consumer credit plan established by or on behalf of," consumers under the age of twenty-one.[192] To open a credit card account, those under twenty-one must: (i) have the signature of a cosigner, including the parent, legal guardian, spouse, or any other individual over twenty-one years old who has the means to repay (and be jointly liable for) the credit card debts; or (ii) submit financial information showing their independent means of repaying any obligation arising from the proposed extension of credit.[193]

A fifth option is to afford purchasers a cooling-off period. Consumers in an emotional, impulsive state can make unwise decisions that they later regret.[194] Federal and state laws along with regulations recognize this.[195] From a behavioral economics perspective, the effectiveness of cooling off periods is mixed. On the one hand, consumers, upon reflection, can reconsider a

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balance from month to month say they do not know how much interest they paid on their primary credit card last year." *Id.*

[190] LACKO, *supra* note 141 (finding that the current mortgage cost disclosures failed to convey key mortgage costs to consumers, and the tested disclosure prototype improved the surveyed consumers' understanding, especially for more complex loans).

[191] Sunstein & Thaler, *Libertarian Paternalism Is Not an Oxymoron*, *supra* note 174, at 1189. Besides procedural constraints, they propose substantive constraints that allow people "to reject the default arrangement, but not on whatever terms they choose." *Id.*

[192] Credit CARD Act, *supra* note 178, at § 301.

[193] *Id.*

[194] *See* Samuel M. McClure et al., *Separate Neural Systems Value Immediate & Delayed Monetary Rewards*, SCI., Oct. 13, 2004, at 503-07; ARIELY, *supra* note 116, at 89-126.

[195] *See* Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 C.F.R. Part 429 (2011); Camerer et al., *supra* note 11, at 1241-44 (collecting federal and state cooling-off statutes); *see also* Truth in Lending (Regulation Z), 12 C.F.R. § 226.15 (2011) (Regulation Z cooling-off period).

purchase, especially one involving high-pressure sale tactics. On the other hand, the more time one has to complete a task, the behavioral economics literature suggests, the greater the likelihood one will not complete that task.[196] For example, a customer's likelihood of redeeming a rebate may be inversely proportional to the rebate period's length.[197] Consumers assume that they eventually will seek the "discount," but ultimately procrastinate.

A sixth option is to impose a behavioral exploitation tax on the rational firm.[198] When the estimated social value of the rational firms' behavior is below its private value, the government can tax the rational firm the difference. The tax seeks to prevent the firms from unjustly enriching themselves from their behavioral exploitation. For example, revenues from payday lending that come from APRs above a certain level would be taxed at higher rates. Credit card revenues earned from late fees would be taxed at higher rates than revenue from annual fees.

A seventh option is for the government to take preventive measures to help consumers debias themselves and improve their willpower. Here, the aim is to make consumers less susceptible to behavioral exploitation.[199] The government can increase: (i) the supply of debiasing methods (e.g., adding courses on financial literacy in high school (emphasizing the behavioral risks and investors' susceptibility to overconfidence bias[200])); (ii) the demand

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[196] *See, e.g.*, Dan Ariely & Klaus Wertenbroch, *Procrastination, Deadlines, and Performance: Self-Control by Precommitment*, 13 PSYCHOL. SCI. 219, 219-24 (2002); Amos Tversky & Eldar Shafir, *Choice Under Conflict: The Dynamics of Deferred Decisions*, 3 PSYCHOL. SCI. 358 (1992).

[197] Matthew A. Edwards, *The Law, Marketing and Behavioral Economics of Consumer Rebates*, 12 STAN. J.L. BUS. & FIN. 362, 391-95 (2007); *see also* Virginia Postrel, *The Gift-Card Economy*, ATLANTIC (May 2009), http://www.theatlantic.com/magazine/archive/2009/05/the-gift-card-economy/7372/ (noting the longer the expiration period, the less likely one will redeem gift card).

[198] *See* Ted O'Donoghue & Matthew Rabin, *Studying Optimal Paternalism, Illustrated by a Model of Sin Taxes*, 93 AM. ECON. REV. 186 (2003).

[199] Gregory Mitchell, *Libertarian Paternalism Is an Oxymoron*, 99 NW. U. L. REV. 1245, 1264 (2005) (exploring how "the first approach of the libertarian central planner would be to debias individuals so that they can make their own rational decisions about which choices best promote their own welfare").

[200] Financial literacy efforts have had mixed results. One study of Harvard undergraduate students and MBA students from Wharton, for example, found a "low

for debiasing, such as imposing procedural constraints on consumer participation in high risk areas of behavioral exploitation, such as subprime lending, unless the consumer participated in an approved online course that outlines the material risks; and (iii) the opportunities to debias, such as facilitating timely feedback mechanisms to make consumers become aware of their errors and the costs of their poor choices, and strategies to avoid errors (e.g., providing employees who have not enrolled into a retirement plan a monthly reminder of how much money they lost to date in matching funds by not contributing to the 401(k), and an easy method to opt-in). The government can also provide consumers, if the market has not, commitment devices.

An eighth option is to increase the firms' search costs of identifying potential victims. One resounding success of the Federal Trade Commission is enabling consumers to easily opt-out of all unwanted telephone solicitations.[201] The government, through a similar common listing service, can enable consumers to opt-out of home or mail solicitations (including credit card offerings) or easily block home-shopping cable stations. The government can increase consumers' privacy rights to make it harder for firms to identify especially bounded rational consumers through their purchasing behavior.

Some argue that "[a]dvocating soft paternalism is akin to advocating an increased role of the incumbent government as an agent of persuasion."[202] Scenario II's policy risks indeed represent a balancing act. While government persuasion increases the risk of authoritarianism, government inaction carries the risks of behavioral exploitation and corporate autocracy. Moreover, anti-

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absolute level of financial sophistication" with subjects basing choices on normatively irrelevant mutual fund attributes. James J. Choi et al., *Why Does the Law of One Price Fail? An Experiment on Index Mutual Funds* 25 (Yale ICF Working Paper No. 08-14, Mar. 6, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstractid=1125023.

[201] *See, e.g.*, Telemarketing Rules, 15 U.S.C. § 6102 (2006); National Do-Not-Call Registry, 16 C.F.R. § 310.4(b)(1)(iii)(B) (2011). As of September 30, 2008, over 172.5 million telephone numbers were on the do-not-call list. *See also* Do-Not-Call Improvement Act of 2007, Pub. L. No. 110-187, 122 Stat. 633 (2008) (telephone numbers placed on the National Do-Not-Call-Registry can remain on it permanently).

[202] Glaeser, *supra* note 107, at 156.

"soft" paternalism can itself be paternalistic. If most consumers (like those in the Federal Reserve's testing) prefer having the default as an opt-in (e.g., requiring consumers to opt into the banks' overdraft programs), then assuming that consumers are indeed sovereign, the banks should comply. If the banks, however, are unresponsive to consumer demand and require consumers to opt-out, why cannot citizens seek from their elected representatives to get what they want? It is hard to see why citizens, in the name of libertarianism, must continue to wait for their desired default option from an unresponsive market.

Accordingly, under any conception of competition with bounded rational consumers, one cannot view antitrust and consumer protection as unrelated. Under Scenario II, both consumer protection and antitrust law promote the opportunity for informed consumer choices. Ideally, informed consumers choose among the innovating firms' solutions for their problems.[203] Given the importance of individual autonomy in overall well-being, the government must carefully delineate between behavioral exploitation and behavioral freedom, where firms help consumers address their bounded rationality and willpower. After all, it would be counterproductive if antitrust policy promotes diversity of products and services and the process of search and experimentation, while consumer protection law bans all products except the one the government believes is the best. Ideally, antitrust and consumer protection laws deter market failure (e.g., systemic behavioral exploitation) and ensure that consumers, once informed, can choose among products and services.

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[203] Wolfgang Kerber, *Competition, Innovation and Maintaining Diversity Through Competition Law*, *in* ECONOMIC APPROACHES TO COMPETITION LAW: FOUNDATIONS AND LIMITATIONS (Josef Drexl et al. eds., 2010), *available at* http://ssrn.com/abstract=1543725.

C. Scenario III: Bounded Rational Firms and Rational Consumers

Here consumers are relatively more rational than firms in the industry.[204] Excessive optimism can have procompetitive benefits, such as the firms' willingness to innovate and enter new markets.[205] But excessive optimism can harm the firms and economy. Consumers, in response to the firms' behavior, ask, "What were they thinking?" One recurring theme in the business literature is how once mighty firms (e.g., the U.S. car manufacturers[206]) lose sight of their customers' needs or are in denial.[207]

This Scenario helps explain why some corporate executives, with much to lose, risk criminal liability by fixing prices with their

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[204] For Scenarios III and IV, one must also distinguish between the firms' and economists' conception of rationality. *See, e.g.*, Russell Pittman, *Who Are You Calling Irrational? Marginal Costs, Variable Costs, and the Pricing Practices of Firms*, U.S. Dep't of Justice, Antitrust Div. (Economic Analysis Group, Discussion Paper No. 09-3 July 2009), *available at* http://www.justice.gov/atr/public/eag/248394.pdf (noting this disconnect as to pricing decisions). Some economists view marginal costs narrowly, and deem business executives who take fixed and sunk costs into account in their pricing decisions as naïve. But as Pittman points out, in the long-run, a firm's revenues must cover not only its operating costs but its invested capital. *Id.* at 2. "Setting price equal to average variable cost, with no 'margin' for fixed costs, is a strategy for firms exiting a market, not for long-term survival." *Id.* at 5. Thus, a profit-maximizing firm produces where its MC (marginal cost) = AVC (average variable cost) + FC (fixed cost) / Q (quantity). Firms may also engage in other conduct that economists deem as "irrational," but which consumers deem as fair. Some economists are agnostic on price discrimination or believe that in certain instances it may be pro-competitive; ninety-one percent of individuals in one survey thought charging higher prices to those who are more dependent on the product was offensive. Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 735 (1986). So, even though firms could price discriminate, some may decline, so as to not offend their customers.

[205] *See* Don A. Moore et al., *What Competition? Myopic Self-Focus in Market-Entry Decisions*, 18 ORG. SCI. 440, 441-42 (2007); Langevoort, *supra* note 69, at 11.

[206] John E. Kwoka, Jr., *The U.S. Industry Under Duress: Fit, or Finished?*, 5 COMPETITION POL'Y INT'L 49 (2009).

[207] *See, e.g.*, RICHARD S. TEDLOW, DENIAL: WHY BUSINESS LEADERS FAIL TO LOOK FACTS IN THE FACE—AND WHAT TO DO ABOUT IT (2010); *Strategic Decisions: When Can You Trust Your Gut?*, MCKINSEY Q., Mar. 2010, *available at* http://www.mckinseyquarterly.com/Strategic_decisions_When_can_you_trust_your_gut_2557.

competitors;[208] are likely to advocate a merger;[209] are overconfident about a merger's likely efficiencies;[210] overvalue the purchased assets;[211] are overly confident or pessimistic about their chances of entering particular markets;[212] and consistent with the sunk cost fallacy, throw good money after bad in corporate projects.[213]

Professor Waller recently examined evidence from corporate finance that suggests entire categories of mergers are more likely to destroy, rather than enhance, shareholder value.[214] Among the

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[208] Maurice E. Stucke, *Am I a Price-Fixer? A Behavioral Economics Analysis of Cartels*, *in* CRIMINALISING CARTELS: A CRITICAL INTERDISCIPLINARY STUDY OF AN INTERNATIONAL REGULATORY MOVEMENT (Caron Beaton-Wells & Ariel Ezrachi eds., 2011).

[209] Ulrike Malmendier, *A "New" Paradigm in Corporate Finance: The Role of Managers and Managerial Biases*, 4 NBER REPORTER 13, 15-16 (2010), *available at* http://www.nber.org/reporter/2010number4/ulrike.html (discussing correlation between overconfidence and acquisitions by cash-rich firms not dependent on external financing).

[210] *See, e.g.*, ROBERT F. BRUNER, DEALS FROM HELL: M&A LESSONS THAT RISE ABOVE THE ASHES (2005) (summarizing major failed mergers); Matthew T. Billett & Yiming Qian, *Are Overconfident CEOs Born or Made? Evidence of Self Attribution Bias from Frequent Acquirers*, 54 MGMT. SCI. 1037 (2008) (finding from sample of public acquisitions between 1985 and 2002 that CEOs who previously engaged in a successful acquisition appear to overly attribute their role in successful deals, leading to more deals even though these subsequent deals are value destructive).

[211] Mathew L.A. Hayward & Donald C. Hambrick, *Explaining the Premiums Paid for Large Acquisitions: Evidence of CEO Hubris*, 42 ADMIN. SCI. Q. 103, 122 (1997) (finding from empirical study of mergers over $100 million involving publicly traded firms over four year period that CEO hubris plays a substantial role in acquisition process and acquisitions tend to reduce shareholder wealth); *see also* RICHARD H. THALER, WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE 50-62 (1992) (discussing experimental and field evidence); Mauricio R. Delgado et al., *Understanding Overbidding Using the Neural Circuitry of Reward to Design Economic Auctions*, SCI., Sept. 26, 2008, at 1849; Mackintosh, *supra* note 129, at 15 (discussing a 2010 auction of a $20 bill for $61).

[212] Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L.J. 1527, 1559 (2011) (discussing increasing interest in behavioral economics and its applications to competition law); Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L.J. 513 (2007).

[213] Malcolm Baker et al., *Behavioral Corporate Finance: A Survey*, *in* HANDBOOK OF CORPORATE FINANCE: EMPIRICAL CORPORATE FINANCE 172 (B. Espen Eckbo ed., 2007); Hal R. Arkes & Catherine Blumer, *The Psychology of Sunk Cost*, 35 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 124, 124-40 (1985).

[214] Spencer Weber Waller, *Corporate Governance and Competition Policy*, 18 GEO. MASON L. REV. 833 (2011); Pittman, *supra* note 204, at 215-19 (discussing empirical

well-known biases and heuristics relevant to the decision to enter in mergers and acquisitions, which frequently result in value destroying transactions, include "myopia, loss aversion, endowment effects, status quo bias, extremeness aversion, over-optimism, hindsight bias, anchoring heuristics, availability heuristics, framing effects, representative bias, saliency effects, and others."[215] Executives, in behavioral studies, were overconfident in their ability to manage a company, systematically underestimated their competitors' strength, and were prone to self-serving interpretations of reality (e.g., taking credit for positive outcomes and blaming the environment for negative outcomes).[216]

Scenario III in theory should be of less concern. Absent a natural monopoly or high entry barriers, rational consumers should take their business elsewhere. The critical assumption is that when bounded rational firms, unlike their rational profit-maximizing counterparts, are overoptimistic concerning a merger's efficiencies, overconfident in their escaping detection for their cartel activities, and more or less risk averse in entering a new market, they quickly bear the cost of their miscalculation. The market swiftly punishes the bounded rationality. The firm either improves its decision-making or is eliminated.

But this is not always true. As the financial crisis reflects, many Wall Street firms were not swiftly punished (or their executives ever punished) for their bounded rationality.[217] Thus,

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literature that stockholders of acquiring firms do not benefit or do not benefit much from mergers).

[215] Waller, *supra* note 214, at 878.

[216] Colin F. Camerer & Ulrike Malmendier, *Behavioral Economics of Organizations*, *in* BEHAVIORAL ECONOMICS AND ITS APPLICATIONS 235, 246, 260-64 (Peter Diamond & Hannu Vartiainen eds., 2007). For several recent surveys of the empirical literature see Langevoort, *supra* note 69, at 73-77; Mark Armstrong & Steffen Huck, *Behavioral Economics as Applied to Firms: A Primer*, 6 COMPETITION POL'Y INT'L 2 (2010); and Christoph Engel, *The Behaviour of Corporate Actors: A Survey of the Empirical Literature* 7-8 (Max Planck Inst. for Res. on Collective Goods, Preprint No. 2008/23, Feb. 2010), *available at* http://ssrn.com/abstract=1135184.

[217] *See, e.g.*, Avishalom Tor & William J. Rinner, *Behavioral Antitrust: A New Approach to the Rule of Reason after Leegin*, 2011 U. ILL. L. REV. 805, 839 (2011) (noting how some bounded rational manufacturers will overuse resale price maintenance, and as the historical evidence and behavioral research reveal, "the

one cannot assume that corporate behavior is as, if not more, rational than consumer behavior.

1. Scenario III's Policy Implications Assuming the Government Is Rational

One cannot say that the government is always less rational than private firms. With politically accountable elected representatives from different communities, a legislature can see what firms and individuals in any community cannot.[218] The government is not always more rational than its firms or citizens. But the legislature has a unique vantage. As President Roosevelt wrote in recommending the strengthening and enforcement of the antitrust laws, the larger and more important question involves honest citizens "who cannot see the social and economic consequences of their actions in a modern economically interdependent community."[219]

If private firms are less rational than consumers and the government, then one risk under Scenario III is that the government will seek to run the marketplace like a government bureaucracy. The government may seek to displace bounded rational firms with state-owned enterprises or regulate the firms with the goal "to organize the whole national economy like the postal system."[220] The government could become less rational, and the resulting risks (including authoritarianism) and societal welfare loss from government's central planning may far exceed the losses from the firms' bounded irrationality.

Instead of central planning, a rational government should return to first principles. It should inquire why consumers did not

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efficacy of repeated decisions, organizations, and market pressure in correcting manufacturer bias is limited").

[218] *See Essay 10 of the Federalist*, *in* THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS 173 (David Wootton ed., 2003).

[219] Message from President Franklin D. Roosevelt to the Congress Transmitting Recommendations Relative to the Strengthening and Enforcement of Antitrust Laws, Apr. 29. 1938, S. Doc. No. 173, 75th Cong., 3d Sess. 1 (1938), *reprinted in* 4 EARL W. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3408 (1978).

[220] MISES, *supra* note 66, at xvi (quoting LENIN, STATE AND REVOLUTION 44, 83-84 (Int'l Publishers 1932) (1917)).

(or could not) punish the bounded rational firm. When consumers are sovereign, private firms have a strong incentive to debias in order to gain a competitive advantage and avoid consumer punishment.[221] Scenario III's policy implications differ from Scenario II's. Under Scenario II, it makes sense at times to insulate rational firms from consumers' bounded rationality and willpower (such as promoting the firm's incentives to maximize long-term value and economic efficiency, contrary to the pressures of bounded rational investors to maximize the stock price in the short-term).[222] Under Scenario III, in contrast, it makes sense at times to expose bounded rational firms to market demands.[223] The government should identify and eliminate protective barriers (e.g., high import tariffs) or subsidies that reduce the firms' incentives to debias.[224]

One incentive to debias is the prospect of failure and market exit.[225] Suppose a bounded rational firm, overconfident in its risk assessment models, becomes more leveraged. Ideally, industry regulators, creditors, and shareholders monitor the bounded rational firm to prevent such over-leveraging. But if the bounded rational firm is deemed too big (or important) to fail, the dynamics change. A dominant firm has greater incentive (and freedom) to take excessive risks. Rational investors know of the firm's implicit government guarantee. Its shareholders and creditors will not punish this risk-taking: when the risky investments work in the firm's favor, they benefit. When the risky investments fail, the government's implicit guarantee forecloses the possibility of market exit.[226] The government guarantee itself has value, which

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[221] Langevoort, *supra* note 69, at 66-67.

[222] Baker et al., *supra* note 213, at 148.

[223] *Id.*

[224] Another possibility is that the managerial decisions are infrequent and do not provide clear feedback to managers, shareholders, and consumers. Camerer & Malmendier, *supra* note 216, at 258.

[225] In addition, there is the principal/agent problem. Managers have the incentive to take on large risks, when there is no downside to them personally. If the risky venture succeeds, the manager benefits from the increase in value to the firm and their compensation. If the risky venture fails, the managers may have already left the firm or leave with a golden parachute. CASSIDY, *supra* note 86, at 291.

[226] JOHNSON & KWAK, *supra* note 7, at 204.

can reduce the firm's borrowing costs.[227] The too-big-and-integral-to-fail firms thus enjoy a competitive advantage over smaller rivals, which are allowed to fail.[228] Smaller firms cannot undertake such risk and cannot profit accordingly when the bets pay off. Without a government guarantee, the smaller firms incur higher costs to borrow money. Indeed, one criticism is that after the crisis, U.S. financial institutions increased their market power by acquiring competitors (such as Bank of America absorbing Merrill Lynch and Countrywide, JPMorgan Chase acquiring Bear Stearns and Washington Mutual, and Wells Fargo acquiring Wachovia), while nonbank mortgage lenders exited the marketplace.[229] So, smaller banks have a greater incentive to merge where they too become too-big-and-integral-to-fail.

Consequently, overconfidence, especially for firms less dependent on lending intermediaries, can motivate merger activity, under Scenario III. Accordingly, rational competition officials would display: (i) greater skepticism over the likely efficiencies of otherwise problematic mergers;[230] (ii) greater concern over the systemic risks posed by the mergers; and (iii) greater concern, than they have in recent decades, over the likelihood and magnitude of false negatives rather than false positives in merger review.

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[227] *Id.* at 180-81 (noting that during the crisis, large banks could borrow money at rates 0.78 percentage points more cheaply than smaller banks, which was higher than the average differential of 0.29 percentage points between 2000 and 2007).

[228] STIGLITZ, *supra* note 2, at 166; *see also* Mervyn King, Governor, Bank of Eng., Speech to the Scottish Business Organizations (Oct. 20, 2009), *available at* http://www.bankofengland.co.uk/publications/speeches/2009/speech406.pdf ("Encouraging banks to take risks that result in large dividend and remuneration payouts when things go well, and losses for taxpayers when they don't," remarked the Governor of the Bank of England, "distorts the allocation of resources and management of risk.").

[229] JOHNSON & KWAK, *supra* note 7, at 171-72, 180 (noting how those three banks and Citibank controlled half the market for new mortgages, and two-thirds of the market for new credit cards).

[230] Waller, *supra* note 214, at 873-74 (noting how corporate finance literature suggests that "mega-mergers on a stock for stock basis between roughly equal competitors are highly likely to destroy shareholder value").

2. Scenario III's Policy Implications Assuming the Government Is Bounded Rational

One risk is that the bounded rational government, overconfident in its understanding of competition, relies on empirically suspect assumptions. In presuming that firms are as rational as consumers, the government's theory of competition resembles Scenario I, when empirically it resembles Scenarios III or IV. The government's mergers policies accordingly are too lenient while its prosecutions of price-fixers are too severe.

One concern is that the government, when confronted with evidence of firms' bounded rationality, either attempts to justify the behavior under rational choice theory, or if no explanation exists, ignores it. For example, the U.S. Horizontal Merger Guidelines assume that market participants behave as rational profit-maximizers.[231] Accordingly, sustained market power is not theoretically feasible where entry barriers are low.[232] Antitrust policy assumes that: (i) supra-competitive prices will attract rational profit-maximizing firms into markets characterized with low entry barriers; (ii) the new entrants will replenish the lost output; and (iii) as a result, prices will return closer to marginal cost. Operating under the false impression that market participants, pursuing their economic interests, will self-police and regulate, the government will be more concerned about the risk of false positives than negatives from their enforcement activity, especially in markets characterized with moderate to low entry barriers.[233]

But under Scenario III, contrary to the guidelines' hypothesis, firms do not always enter markets with low entry barriers to defeat the exercise of market power.[234] Nor does a bounded rational government inquire why price-fixing occurs in

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[231] HORIZONTAL MERGER GUIDELINES, *supra* note 61, at § 1.0.

[232] *Id.* at § 9.0; Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1335 (7th Cir. 1986) (noting that "the lower the barriers to entry, and the shorter the lags of new entry, the less power existing firms have").

[233] Kara Scannell & Sudeep Reddy, *Greenspan Admits Errors to Hostile House Panel*, WALL ST. J., Oct. 24, 2008, at A1, *available at* http://online.wsj.com/article/SB122476545437862295.html.

[234] Reeves & Stucke, *supra* note 212, at 1554-56.

markets with low entry barriers.[235] Instead, the government seeks to reconcile this non-entry with its flawed economic theory (e.g., markets that "superficially" appear to have low entry barriers, actually are more difficult to enter, so rational profit-maximizing firms accurately discerned that entry would have been unprofitable at pre-merger levels).[236]

While too lenient in merger review, the bounded rational government, relying on optimal deterrence theory, can be too punitive in its criminal antitrust prosecutions. This too can harm consumers. The government erroneously believes that price-fixers, under Scenario III, behave as rational profit-maximizers. To deter cartels, optimal deterrence theory posits that the penalty should equal at least the violation's expected net harm to others (plus enforcement costs) divided by the probability of detection and proof of the violation.[237] Setting the antitrust penalty at this optimal level, in theory, should result in the socially optimal level of price-fixing.

Faced with evidence of durable cartels and high recidivism, a bounded rational government, under optimal deterrence theory, can increase either: (i) the probability of detection (which is difficult with an already generous amnesty program to induce price-fixers to implicate their co-conspirators); or (ii) the criminal (and/or civil) penalties, which presumably are sub-optimal in deterring cartels. The problem is if the antitrust penalties are already at (or above) the optimal level. Bounded rational firms fix prices, not because the antitrust fines are too low, but due to situational (e.g., industry norms) and dispositional (e.g., executives' overconfidence in escaping detection) factors. The

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[235] *Id.*

[236] This ex post justification is a difference in perception—what seems like easy markets to profitably enter (such as turtles) are actually quite difficult. But this raises the accuracy of competition agencies (typically their paralegals and new lawyers) in screening thousands of HSR merger filings annually. How will they distinguish high and low entry barriers? Thus, a bounded rational government official can seek to explain ex post the lack of entry that is consistent with rational choice theory, but the issue is predicting entry ex ante.

[237] Gary S. Becker, *Nobel Lecture: The Economic Way of Looking at Behavior*, 101 J. POL. ECON. 385, 389-90 (1993); *see also* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 656, 666-68 (1983).

bounded rational government fails to recognize this possibility. Rather than address these situational and dispositional factors through a pluralism of mechanisms, such as criminal and civil penalties, structural means (improved merger review), and informal norms that highlight price-fixing's ethical and moral implications,[238] the government instead continues to increase the penalties, under the belief they are suboptimal. Excessive fines can harm consumers when they cause firms to reduce investments in innovation and raise prices. If firms cannot absorb or otherwise pass along the fines as higher prices, then the firms either reorganize under the bankruptcy laws or exit the market, which as a consequence has fewer meaningful competitors.[239]

D. Scenario IV: Bounded Rational Firms and Consumers

Under this last scenario, many market participants have bounded rationality and willpower. Biases and heuristics are systemic. At closer inspection, competition under Scenario IV is better viewed as a discovery process than a stable equilibrium. Bounded rational firms have imperfect knowledge about current and future consumer preferences, a blurred and changing understanding of their goals and preferences, and a limited repertoire of actions to cope with whatever problems they face.[240] Bounded rational consumers have changing and, at times,

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[238] *See* EUROPEAN COMM'N, DG COMPETITION STAKEHOLDER STUDY: AGGREGATE REPORT 8 (July 2010), *available at* http://ec.europa.eu/competition/publications/reports/aggregate_report_en.pdf (Conducted by TNS Qual+ at the request of European Commission Directorate General for Competition, noting that a "number of stakeholders across all groups stressed that, while fines are an effective deterrent, they are not the only tool available to DG Competition. A number of alternatives were suggested (criminal sanctions, publication of the companies' infringements, compensation payments for harmed consumers, etc.) but with mixed views about whether individual criminal liability should be introduced as an additional deterrent."); Int'l Competition Network Working Grp. on Cartels, *Defining Hard Core Cartel Conduct: Effective Institutions, Effective Penalties*, *in* BUILDING BLOCKS FOR EFFECTIVE ANTI-CARTEL REGIMES (2005), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc346.pdf (noting additional ways of achieving deterrence, including press coverage).

[239] Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443, 481.

[240] Giovanni Dosi & Luigi Marengo, *On the Evolutionary and Behavioral Theories of Organizations: A Tentative Roadmap*, 18 ORG. SCI. 491, 492, 494 (2007).

inconsistent preferences.[241] For example, they demand more choices than they actually prefer.[242] Bounded rational firms comply, leading to suboptimal results for consumers[243] and firms.[244]

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[241] *See, e.g.*, Richard Layard, *Happiness & Public Policy: A Challenge to the Profession*, 116 ECON. J. C24, C24 (2006) (noting from happiness economic literature how "tastes are not given—the happiness we get from what we have is largely culturally determined"); Steven C. Michael & Tracy Pun Palandjian, *Organizational Learning and New Product Introductions*, 21 J. PROD. INNOVATION MGMT. 268, 270 (2004) (discussing shampoo industry dynamism where consumers with changing tastes seek variety).

[242] Under Scenario I, providing rational consumers more choices is generally beneficial. Rational firms target consumers' particular needs and tastes more accurately with more choices. Market forces should set the optimal amount of choice. Rational manufacturers will supply (when profitable) products that satisfy the desired mix of price, performance, and other attributes. But under Scenario IV, more options do not always increase welfare. Under Scenario IV, bounded rational consumers may demand additional options and seek to preserve existing options. In one computer experiment conducted by Professor Ariely, participants tried to keep options open even when counter-productive. In the Door Game, each MIT student could click on three doors on the computer screen to find the room with the biggest payoff (between $0.01 and $0.10). Each student was given 100 clicks, and could click one door as many times possible without a penalty. Each time the student sampled another door, that switch cost the student one additional click. Experiment Two, the Disappearing Door Game, was the same as the Door Game except each time a door was left unvisited for twelve clicks, it disappeared forever. To keep options open, participants in Experiment Two ended up making substantially less money (about fifteen percent less) than participants in Experiment One. Participants would have made more money by sticking to one door. A similar result occurred when participants were told the exact monetary outcome they could expect from each room. ARIELY, *supra* note 116, at 142-48.

[243] Some bounded rational consumers, faced with many choices, avoid choosing any option, even when the choice of opting out has negative consequences for future well-being. Simona Botti & Sheena S. Iyengar, *The Dark Side of Choice: When Choice Impairs Social Welfare*, 25 J. PUB. POL'Y & MARKETING 24, 26 (2006) (discussing information overload, where an increase in options raises the cognitive costs in comparing and evaluating the options and leads to suboptimal decision strategies). Other bounded rational consumers choose an option, but have lower confidence in their choice and greater dissatisfaction in choosing.

[244] The bounded rational firms, as a result, lose sales opportunities of their products. Iyengar and Lepper, in their famous experiment, set up a tasting booth in an upscale grocery store. The booth displayed either six or twenty-four different flavors of jam. A greater percentage of the shoppers stopped to sample one of the displayed jams when the booth had twenty-four jam flavors (sixty percent versus forty percent when booth displayed six jam flavors). But a lower percentage actually purchased a jar of jam (three percent versus thirty percent of customers when booth had only six flavors).

Scenario IV competition is an "evolutionary trial and error process, in which the firms try out different problem solutions and can learn from the feedback of the market, which of their specific products and technological solutions are the superior ones."[245] Rather than an end-state capable of being perfected, competition is a continuous process "in which previously unknown knowledge is generated," and "the multiplicity and diversity of the (parallel trials of the) firms might be crucial for the effectiveness of competition as a discovery procedure."[246] Firms and consumers make mistakes, readjust, and undertake new strategies. The competitive process "is inherently a process of trial and error with no stable end-state considered by the participants in the process."[247]

Scenario IV involves several important competitive dimensions beyond price. First, bounded rational firms compete in the ways they debias themselves.[248] Firms (like consumers) can improve (or regress) in their decision-making and willpower.[249] The ways in which companies learn, accomplish tasks, and deal

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Sheena S. Iyengar & Mark R. Lepper, *When Choice Is Demotivating: Can One Desire Too Much of a Good Thing?*, 79 J. PERSONALITY & SOC. PSYCHOL. 995, 995-1006 (2000).

[245] Kerber, *supra* note 203, at 2; *see also* Moreau, *supra* note 96, at 851 (discussing how "evolutionary theory refutes the neoclassical economic theory's focus on a steady state of the economic system"). Industries may have multiple equilibria. The speed with which the market approaches these equilibria may vary over time, and the equilibria themselves may change because of change in the system itself. The result is that "equilibrium points in an evolutionary system are rarely actually reached." Instead, these equilibrium points "serve as an attractor that pulls the system towards itself for a prolonged period, before giving way to a new attractor." Bart Verspagen, *The Use of Modeling Tools for Policy in Evolutionary Environments*, 76 TECHNOLOGICAL FORECASTING & SOC. CHANGE 453, 455 (2009), *available at* http://arno.unimaas.nl/show.cgi?fid=17564.

[246] Kerber, *supra* note 203, at 2.

[247] Moreau, *supra* note 96, at 851.

[248] *See, e.g.*, Andrew Healy, *Do Firms Have Short Memories?: Evidence from Major League Baseball*, 9 J. SPORTS ECON. 407, 415-18 (2009) (discussing how some professional baseball teams overweigh, relative to more successful teams, athletes' recent performance in determining salary).

[249] *See* Linda Argote & Henrich R. Greve, A Behavioral Theory of the Firm—*40 Years and Counting: Introduction and Impact*, 18 ORG. SCI. 337 (2007) (surveying impact of *Behavioral Theory of the Firm*'s impact on organizational science research, including institutional theory and population ecology); Dosi & Marengo, *supra* note 240, at 491.

with the uncertainty can vary.[250] Rather than incur costs to continually process information anew, bounded rational firms (like consumers) can use rules-of-thumb (heuristics). Firms with better routines and rules-of-thumb can lower their information processing costs and secure a competitive advantage. Firms can improve feedback mechanisms to learn more quickly from their (or other firms') mistakes.[251] Moreover, firms can identify common biases and take preventive measures.[252] Consequently, one important facet of Scenario IV competition is how firms discover and implement routines to gain a cost advantage.

But if firms become too wedded to existing routines, they face the risk of competency traps. As industry conditions change, the firms' existing routines can place them at a competitive disadvantage.[253] Under Scenario IV, "In some sense knowledge depreciates in value over time."[254] Thus, another important dimension of competition is adaptive efficiency,[255] whereby bounded rational firms update routines to reflect consumers' changing preferences.[256] Firms compete by continually learning

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[250] *See* Dan Lovallo & Olivier Sibony, *The Case for Behavioral Strategy*, MCKINSEY Q., Mar. 2010, at 3, *available at* http://www.veruspartners.net/private/app/webroot/files/cabe10.pdf (noting recent survey of 2,207 executives where only twenty-eight percent said the quality of their companies' strategic decisions was generally good, sixty percent thought that bad decisions were about as frequent as good ones, and twelve percent thought good decisions were altogether infrequent).

[251] *See* John A. List, *Does Market Experience Eliminate Market Anomalies?*, 118 Q.J. ECON. 41 (2003); John A. List, *Neoclassical Theory Versus Prospect Theory: Evidence from the Marketplace*, 72 ECONOMETRICA 615, 615 (2004). For example, frequent and more experienced sports cards traders display less of an endowment effect for sports cards (such as baseball trading cards) than for other items such as chocolates and mugs.

[252] Camerer & Malmendier, *supra* note 216, at 269 (noting some of the literature, investment firms combat loss aversion by having traders switch positions with one another).

[253] Eyal Biyalogorsky et al., *Stuck in the Past: Why Managers Persist with New Product Failures*, 70 J. MARKETING 108 (2006) (discussing the "extensive attention in the literature" to firms' escalation of commitment, which is the tendency of managers to stay committed to a course of action despite strong negative feedback with respect to the advisability of this action); Michael & Palandjian, *supra* note 241, at 270 (discussing literature on competency traps).

[254] NORTH, *supra* note 41, at 323 (discussing uncertainty in a non-ergodic world (e.g., Scenario IV)).

[255] *Id.* at 70.

[256] Michael & Palandjian, *supra* note 241, at 275.

about customer preferences and competitors' experimentation, and experimenting themselves with new technologies, routines, and ways of organizing.

A third important dimension of Scenario IV competition is in providing bounded rational consumers a better mix of solutions for their problems.[257] Through their (or monitoring their competitors') trial-and-error experiments, firms update product offerings to accommodate consumers' changing preferences. Their ability depends in part on the feedback loop's efficacy and the competitive behavior's transparency.[258] Alternatively, bounded rational firms in Scenario IV (as in Scenario II) can seek to mitigate competition by reducing price transparency and differentiating their products or services through branding and technological innovation.[259]

A fourth important dimension of Scenario IV competition is the importance of individuality, creativity, and distinctiveness. Under Scenario I competition, rational individuals are undifferentiated in motivation. When given the opportunity, they seek to promote their economic self-interest. Labor is a commodity, an instrument for providing goods and services, and can be downsized, outsourced, or automated.[260] There is no inherent dignity in work or greater social calling to use one's skills to society's betterment. But as a matter of common experience, the greater value we see our work as having, the more meaning we can attribute to our work, and the more engaged and motivated we will be in our work.[261] Scenario IV's theory of competition

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[257] *See* MISES, *supra* note 66, at 24 ("[C]ompetition among the various entrepreneurs is essentially a competition among the various possibilities open to individuals to remove as far as possible their state of uneasiness by the acquisition of consumers' goods."); Kerber, *supra* note 203, at 4.

[258] Kerber, *supra* note 203, at 5.

[259] *See* Illinois *ex rel.* Burris v. Panhandle E. Pipe Line Co., 935 F.2d 1469, 1481 (7th Cir. 1991) ("Virtually all business behavior is designed to enable firms to raise their prices above the level that would exist in a perfectly competitive market."); *see also* Desai & Waller, *supra* note 78; Steiner, *supra* note 38, at 84-85 (discussing price premium for strong reputation brands).

[260] In contrast, the Clayton Act provides that the "labor of a human being is not a commodity or article of commerce." 15 U.S.C. § 17 (2006).

[261] DAN ARIELY, THE UPSIDE OF IRRATIONALITY: THE UNEXPECTED BENEFITS OF DEFYING LOGIC AT WORK AND HOME 66-82 (2010); Jason Krieger, *Creating a Culture of Innovation*, GALLUP MGMT. J. (Oct. 5, 2010), http://gmj.gallup.com/content/143282/creating-culture-innovation.aspx (finding that higher levels of

helps explain why firms devote significant resources in identifying and attracting talented workers. It re-introduces moral beliefs of why we work.[262] Scenario IV competition enriches our definition of labor, namely the opportunity to use one's unique gifts to improve the welfare of others, and thereby express and deepen individual dignity.

In addition, by developing a unique identity, firms can promote (or hinder) social, ethical, and moral values that affect employee behavior;[263] these values in turn can lower the firm's monitoring costs and increase its competitiveness.[264]

Scenario IV competition also presents several risks. One risk is that with bounded rational firms and consumers, traditional forms of market failure (such as cartels and monopolies) are likelier in Scenario IV than Scenario I.[265] The stronger the presumption of rationality, the more likely the market will be efficient, and the less the governmental concern over the sustained exercise of market power in markets characterized with low to moderate entry barriers. Consumers can often defeat the exercise of market power by switching to lower-cost substitutes offered by other entrants. But as Scenario III discusses with bounded rational firms, entry does not always occur when rational choice theory predicts it should.[266] Cartels can be more durable when price-fixers, like the subjects in other behavioral

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employee engagement "correlate to more idea sharing, better idea generation, more creativity in role, and improved business outcomes (on key items, including customer metrics, productivity, and profitability)").

[262] R.H. TAWNEY, THE ACQUISITIVE SOCIETY 33 (2004) ("For what gives meaning to economic activity, as to any other activity is [] the purpose to which it is directed.").

[263] Paul C. Nystrom, *Differences in Moral Values Between Corporations*, 9 J. BUS. ETHICS 971, 974 (1990) (survey of how closely-matched corporations within industrial sectors differed significantly than perceived).

[264] GEORGE A. AKERLOF & RACHEL E. KRANTON, IDENTITY ECONOMICS: HOW OUR IDENTITIES SHAPE OUR WORK, WAGES, AND WELLBEING 39-59 (2010) (exploring how workers can abide to shared corporate norms, and lose utility when they put in low effort; and how job-holders, if they have only monetary rewards and only economic goals, "will game the system insofar as they can get away with it").

[265] *See* Stucke, *Behavioral Economists*, *supra* note 212, at 546-75.

[266] *See* Reeves & Stucke, *Behavioral Antitrust*, *supra* note 212.

experiments, are more trustful and cooperative than rational choice theory predicts.[267]

A second risk of Scenario IV competition is new forms of market failure. In competitive markets, firms identify and discover ways to solve consumers' problems.[268] But the financial crisis, Professor Stiglitz wrote, showed how the subprime mortgage industry worsened, rather than solved, borrowers' problems.[269] The subprime mortgages increased costs and risks for consumers while providing mortgage brokers and lenders greater fees. These products, however, increased risk to the institutions that acquired the ensuing credit default swaps and collateralized debt obligations.[270] Among the losers in the financial crisis were supposedly sophisticated investors who failed to appreciate these assets' risks.[271] Moreover, these financial innovations made speculation easier.[272]

A third risk arises from herding. Herding can be beneficial, as a consumer's utility from a product increases when others use the product.[273] But herding can pressure consumers to forego the superior technology for the perceived popular one.[274] Consumers, at times, are confronted with competing, incompatible technologies. In choosing, the consumer wants the technology platform that others will likely choose, as the more popular platform (e.g., Windows operating system) will attract more supporting complements developed for that platform.[275] Each consumer prefers the superior technology. But believing that

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[267] *See* Stucke, *Am I a Price-Fixer*, *supra* note 208; Stucke, *Behavioral Economists*, *supra* note 212.

[268] Kerber, *supra* note 203, at 4.

[269] STIGLITZ, *supra* note 2, at 5, 80.

[270] *See* MICHAEL LEWIS, THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE (2010).

[271] JOHNSON & KWAK, *supra* note 7, at 199; CASSIDY, *supra* note 86, at 272.

[272] *See* GILLIAN TETT, FOOL'S GOLD: HOW THE BOLD DREAM OF A SMALL TRIBE AT J.P. MORGAN WAS CORRUPTED BY WALL STREET GREED AND UNLEASHED A CATASTROPHE (2009); CASSIDY, *supra* note 86, at 239, 243-50.

[273] Marina Lao, *Networks, Access, and "Essential Facilities": From Terminal Railroad to Microsoft*, 62 SMU L. REV. 557, 560-61 (2009).

[274] CASSIDY, *supra* note 86, at 130-31.

[275] *See* United States v. Microsoft Corp., 84 F. Supp. 2d 9, 20 (D.D.C. 1999); Case T-201/04, Microsoft Corp. v. Comm'n, 2007 E.C.R. II-3601.

others will opt for the subpar technology, the consumer will choose the subpar technology and contribute to the suboptimal outcome.

Herding can cause irrational exuberance (or pessimism) over stocks, real estate, and tulips.[276] As Scenario II discusses, even rational investors can join (and lead) the herd if they can derive greater gains from the speculation. Herding can lead to fads, where a consumer's utility from an item (such as a designer bag) depends on who else owns the item (either the perceived trend-setters[277] or masses[278]). Herding can increase market turmoil. When the speculative bubble bursts, the same group of financial institutions can decide to sell the same group of assets to maintain their target leverage ratio; this mass selling further depresses the assets' selling price, prompting the sale of even more assets to de-leverage.[279]

A fourth risk of Scenario IV competition is industry-specific market failures. One example is media bias. Historically, antitrust was concerned about supply-driven media bias.[280] Dominant media firms provide distorted, self-censored, or biased news coverage that deviates from the coverage consumers prefer. One way to reduce supply-driven media bias is to increase the number of independently-owned competitors, thereby: (i) increasing the likelihood that the media remain independent when governments attempt to manipulate the news; (ii) reducing the risk of information being suppressed or distorted when news providers have an interest in manipulating consumers' beliefs; and (iii)

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[276] *See* JOHN KENNETH GALBRAITH, A SHORT HISTORY OF FINANCIAL EUPHORIA (1993).

[277] *See, e.g.*, THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS 25, 33 (Penguin 1994) (1889) (discussing primary motive to accumulate wealth is pecuniary emulation).

[278] *See* Peter Sheridan Dodds & Duncan J. Watts, *Influentials, Networks, and Public Opinion Formation*, 34 J. CONSUMER RES. 441, 441-58 (2007).

[279] CASSIDY, *supra* note 86, at 309-10.

[280] *See, e.g.*, Maurice E. Stucke & Allen P. Grunes, *Toward a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies That Support the Media Sector's Unique Role in Our Democracy*, 42 CONN. L. REV. 101 (2009); Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249, 249 (2001).

driving media firms to invest in providing timely and accurate coverage.[281]

Under Scenario IV, in contrast, more media competition can increase, rather than reduce, media bias. Bounded rational consumers can suffer "belief perseverance," whereby they hold their views notwithstanding disconfirming evidence.[282] Consumers search for, and overvalue, news information that favors their pre-existing cultural outlooks and ideology; they discount, and are reluctant to search for, information that contradicts or challenges their pre-existing cultural outlooks and beliefs.[283] Consumers trade-off the accuracy of a news source for confirmation of their pre-existing beliefs.[284] The marketplace of ideas becomes more fragmented as media outlets increasingly target specific ideological or political beliefs. The greater fragmentation of news coverage deprives "societ[ies] of shared information and experiences, leaving us less able to discuss issues, less exposed to diverse viewpoints, and more inclined to connect primarily, or only, with those with whom we agree."[285] With greater fragmentation of news coverage, the danger exists that consumers seek out only those viewpoints with which they already agree, making reasoned debate more difficult. Accordingly, the greater danger to democracy, under Scenario IV, is not necessarily the lack of media competition, but too much competition and the ensuing demand-driven media bias. [286]

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[281] Matthew Gentzkow & Jesse M. Shapiro, *Competition and Truth in the Market for News*, 22 J. ECON. PERSP. 133, 135-44 (2008).

[282] Lee Ross et al., *Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. PERSONALITY & SOC. PSYCHOL. 880 (1975).

[283] *See* Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149 (2006).

[284] Gentzkow & Shapiro, *Market for News*, *supra* note 281, at 144-45.

[285] LEE C. BOLLINGER, UNINHIBITED, ROBUST, AND WIDE-OPEN 119 (2010).

[286] *See, e.g.*, Stefano DellaVigna & Ethan Kaplan, *The Political Impact of Media Bias*, *in* FACT FINDER, FACT FILTER: HOW MEDIA REPORTING AFFECTS PUBLIC POLICY (2008), *available at* http://elsa.berkeley.edu/~sdellavi/wp/mediabiaswb07-06-25.pdf; Matthew A. Baum & Tim Groeling, *New Media & the Polarization of American Political Discourse*, 25 POL. COMMC'N 345 (2008); Matthew Gentzkow & Jesse M. Shapiro, *Media, Education and Anti-Americanism in the Muslim World*, 18 J. ECON. PERSP. 117 (2004); Matthew Gentzkow & Jesse M. Shapiro, *What Drives Media Slant? Evidence from U.S. Daily Newspapers*, 78 ECONOMETRICA 35 (2010), *available at*

1. Scenario IV's Policy Risks Assuming the Government Is Rational

If the government is relatively more rational than firms and consumers, there remains the risk, as in Scenarios II and III, of authoritarianism and corporate autocracy.

The government, even if more rational, is not omniscient. The government can predict how it would react (under rational choice theory). But the government cannot necessarily predict how bounded rational firms and consumers behave under Scenario IV.[287]

One reason why predictions are harder under Scenario IV lies in the unpredictability of the non-price dimensions of competition. Heterogeneous firms can be more or less successful in debiasing, implementing knowledge into developing product or process innovations, and responding to uncertainty and consumers' changing tastes. Competitive dynamics can change in unforeseen ways, as bounded rational firms attempt to accommodate and adjust to changing consumer preferences.[288] The success of those adjustments and accommodations, in turn, can depend on further changes by private and public institutions.[289]

Our knowledge of future events ranges between ignorance, uncertainty, risk, and certainty. Economic life is an adventure, but not a rollercoaster. Waking up tomorrow, I would not expect the value of the U.S. stock market to lose about $1.2 trillion, my employer to close its doors, or my country to default on its debt. But Black Swan events, Nassim Nicholas Taleb describes, carry an extreme impact and are outside the realm of regular

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http://faculty.chicagobooth.edu/matthew.gentzkow/research/biasmeas.pdf; Charles S. Taber & Milton Lodge, *Motivated Skepticism in the Evaluation of Political Beliefs*, 50 AM. J. POL. SCI. 755 (2006).

[287] *See, e.g.*, Camerer & Fehr, *supra* note 126, at 50 (distinguishing between predictions when player strategies are complements (less predictable) and substitutes (more predictable)).

[288] RICHARD R. NELSON & SIDNEY G. WINTER, AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE 370 (1982).

[289] *See, e.g.*, NORTH, *supra* note 41, at 116-26.

expectations, because nothing in the past can convincingly point to its possibility.[290]

Even for non-Black Swan events, like the price of bagels, competition can be viewed under Scenarios I and IV. I expect my bagel shop tomorrow to have the same assortment of bagels (plain, onion, poppy seed, etc.) and prices as today. Consumer preferences should not change dramatically overnight. The price, variety, and quality of bagels should not fluctuate wildly (e.g., two dollar gourmet bagels on Thursday and seventy-cent plain bagels on Friday). But my comfort level decreases when trying to forecast bagel prices over a larger geographic area over a longer time period. The risk factors for the bagel industry, according to one public company, include: (i) changes in general economic conditions and discretionary consumer spending, particularly spending for meals prepared away from home; (ii) changes in consumer tastes and preferences, through new diet fads (e.g., low-carbohydrate diets) or government regulations (e.g., the prominent disclosure of nutritional and calorie information); (iii) food safety and reputation for quality; (iv) volatile commodity prices; (v) weather conditions (including natural disasters);[291] and (vi) a regional or global health pandemic, which could severely affect bagel businesses that position themselves as a "neighborhood atmosphere" where "people can gather for human connection and high quality food."[292] So, if bagel manufacturers face challenges in predicting and satisfying consumer preferences over the coming years, so too will competition authorities when predicting competitive effects in that industry.

Adding to the uncertainty under Scenario IV is path dependency. Private and government agents' prior choices and historical experiences can constrain the current choice set.[293] A seemingly minor event that happened yesterday in the market can

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[290] NASSIM NICHOLAS TALEB, THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE (2007).

[291] EINSTEIN NOAH REST. GRP., INC., FORM 10-K ANNUAL REPORT (Feb. 25, 2010), *available at* http://www.faqs.org/sec-filings/100225/EINSTEIN-NOAH-RESTAURANT-GROUP-INC_10-K/.

[292] *Id.*

[293] NORTH, *supra* note 41, at 52; TAWNEY, *supra* note 262, at 28 (observing how revolutions "are apt to take their color from the regime which they overthrow").

have significant long-term consequences.[294] Some industries, like evolutionary processes generally, are characterized by a degree of persistence of random events. "Rather than being additive to a deterministic equilibrium, small random events in evolutionary processes may accumulate into larger factors that may change the nature of the system and its history."[295] Under an evolutionary economic process, "chance plays a significant role."[296]

One example is Microsoft. In the late 1960s, IBM controlled about seventy percent of the computer market. The Justice Department challenged IBM's practices, particularly its "bundling" hardware and software. During the antitrust litigation, IBM changed course:

> Precipitated by a massive antitrust complaint filed against IBM by the Justice Department in January 1969, the company reexamined its practices and decided to stop requiring customers to buy software, services, and hardware as one bundle in June of the same year. This pricing change opened up software markets to independent companies.[297]

This contributed to the development of the computer software industry. A decade later, when preparing to launch its personal computers, the still dominant IBM approached a start-up company Microsoft about creating a version of a BASIC computer program. Microsoft suggested that IBM talk to Digital Research, whose CP/M operating system had become the standard for computer hobbyists. But here, emotion apparently had a lasting impact. Digital Research's president reportedly disliked the arrogant IBM from his university days and was late in meeting the IBM executives (going flying earlier that day). After the negotiations stalled, IBM returned to Microsoft to create an operating system for its personal computer. When introducing its

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[294] Verspagen, *supra* note 245, at 6; *see also* Frank Schweitzer et al., *Economic Networks: The New Challenges*, SCI., July 24, 2009, at 422, 423.

[295] Verspagen, *supra* note 245, at 4.

[296] *Id.* at 6; Schweitzer et al., *supra* note 294, at 423.

[297] R. Lougee-Heimer, *The Common Optimization INterface for Operations Research: Promoting Open-Source Software in the Operations Research Community*, 47 IBM J. RES. & DEV. 57, 59 (2003) (citing THOMAS J. WATSON, JR., FATHER, SON & CO.: MY LIFE AT IBM & BEYOND (1990)).

PC, IBM sold the Microsoft operating system for a much lower price than the CP/M-86 system.[298] One could inquire what would have happened if the Justice Department never brought its antitrust suit against IBM or if Digital Research's president had not gone flying that day.

Another factor is how randomness interplays with predictability in scale-free networks.[299] Scale-free networks are open. They expand through the continuous addition of new members to the system, and they exhibit preferential connectivity, in "that the probability with which a new vertex connects to the existing vertices is not uniform, [but] there is a higher probability that it will be linked to a vertex that already has a large number of connections."[300] To illustrate this, suppose three antitrust professors—Amelia, Beatrice, and Clara—start their careers at similar law schools and their scholarship objectively is of similar quality. The three professors form links (say collaborate on research projects) with one another. Their network expands with each new antitrust law professor. Each new professor must decide with which existing antitrust professor to collaborate. The new professors exhibit preferential connectivity, in that they generally prefer to link with more connected professors. Thus with Amelia, Beatrice, and Clara, the early rounds are more random: the new antitrust professor Daniela can decide to link with Amelia, Beatrice, or Clara. Suppose Daniela randomly decides to collaborate with Amelia and Clara. Now when new professor Eitel decides to collaborate, Amelia and Clara have a slight advantage over Beatrice. Thus, Amelia and Clara can grow in the number of links, as Beatrice lags behind. As Professor Barabási observed with scale-free networks, the rich get richer.[301] The highly connected nodes (law professors Amelia and Clara in our example) acquire more links than the less connected nodes (e.g., Professor

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[298] *See* ERIC D. BEINHOCKER, THE ORIGIN OF WEALTH 326-27 (2006); *The Rest of the Story*, THE SCOBLE SHOW (Aug. 8, 2007), http://scobleizer.com/2007/08/08/the-rest-of-the-story-behind-microsofts-os-deal-with-ibm/.

[299] Albert-László Barabási & Réka Albert, *Emergence of Scaling in Random Networks*, SCI., Oct. 15, 2009, at 509.

[300] *Id.* at 511.

[301] *See* Albert-László Barabási, *Scale-Free Networks: A Decade and Beyond*, SCI., July 24, 2009, at 412 fig. 1.

Beatrice), which leads to the emergence of a few highly connected nodes that become the main hubs for collaboration. Thus, in scale-free networks, one must view the entire process. If one examines the network only half-way through its formation, one might assume that the well-connected antitrust professors were attracting more links because they were better scholars. By then Amelia and Clara might be better scholars (due to the experience of collaboration and receiving as a result more information of current trends). But they reached that success through an element of luck in the beginning. Likewise, in examining the network only at its formation, one might assume that the market was contestable. Each professor has an equal chance of attracting the next link.

2. Scenario IV's Policy Risks Assuming the Government Is Bounded Rational

One risk, as in Scenarios II and III, is the bounded rational government's confirmation bias. The government officials will seek information that confirms (rather than disconfirms) their theory of competition (such as the market participants' rationality and willpower) and discounts or ignores information that challenges their beliefs.[302] Indeed, regulatory capture is most effective when the regulators' "share the worldview and the preferences of the industry they supervise."[303] This was the case with deregulation of the financial services industry, which began during the Reagan Administration,[304] and accelerated under the Clinton[305] and Bush[306] Administrations. One underlying force to this deregulatory movement was the flawed laissez-faire belief that

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[302] CASSIDY, *supra* note 86, at 268-69 (recounting Federal Reserve's belief that advances in technology have enabled the financial services industry to better manage the hazards of their business).

[303] JOHNSON & KWAK, *supra* note 7, at 93.

[304] *Id.* at 70-74.

[305] *Id.* at 84, 89, 98-100, 136-44.

[306] *Id.* at 105; PAUL KRUGMAN, THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008, 162-64 (2009) (criticizing the Bush Administration's laissez-faire attitudes); POSNER, *supra* note 101, at 113, 134-35, 235 (same).

markets were composed of sophisticated investors, and the markets accordingly self-correct.[307]

A second policy risk arises when the bounded rational government is overconfident in its ability to assess the economic effects of certain restraints and predict the likely competitive effects of mergers.[308] Here competition officials do not recognize that their knowledge depreciates in value over time. They remain wedded to theories whose premises are no longer valid. They assume that their economic models still capture the key variables and that the market dynamics remain largely unchanged since they last investigated the industry. They assume that they can accurately predict the future from past experiences (as reflected in the data).[309] They do not assess their models' predictive quality.

Antitrust's economic models mostly seek to reduce uncertainty and simplify. The predicative quality depends in part on the validity of the models' assumptions. Over the past two decades, the available market data have increased. Antitrust enforcers harnessed market data to conduct merger simulations.[310] Generally, the narrower the product category and

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[307] *See, e.g.*, JUSTIN FOX, THE MYTH OF THE RATIONAL MARKET: A HISTORY OF RISK, REWARD, AND DELUSION ON WALL STREET (2009); PRESIDENT'S WORKING GRP. ON FIN. MKTS., OVER-THE-COUNTER DERIVATIVES MARKETS AND THE COMMODITY EXCHANGE ACT (Nov. 1999), *available at* http://www.treasury.gov/resource-center/fin-mkts/Documents/otcact.pdf; John Cassidy, *Letter from Chicago: After the Blowup*, NEW YORKER, Jan. 11, 2010, at 28; Kenneth M. Davidson, *Reality Be Damned: The Legacy of Chicago School Economics*, AM. INT., Nov.-Dec. 2009, at 36, http://www.the-american-interest.com/article-bd.cfm?piece=693; Paul Krugman, *How Did Economists Get It So Wrong?*, N.Y. TIMES, Sept. 6, 2009, at 36, 37 (noting that more important than the economists' failure to predict was "the profession's blindness to the very possibility of catastrophic failures in [the] market economy"). Thus, deregulating derivatives, under this flawed worldview, could only *reduce*, not *increase*, systemic risk.

[308] *See, e.g.*, CASSIDY, *supra* note 86, at 275-76 (discussing illusion of predictability).

[309] NORTH, *supra* note 41, at 19.

[310] *See* Daniel Hosken et al., *Demand System Estimation and Its Application to Horizontal Merger Analysis* 5 (Fed. Trade Comm'n Bureau of Econ., Working Paper No. 246, Apr. 2002), *available at* http://www.ftc.gov/be/workpapers/wp246.pdf (discussing use of scanner data for demand estimation); David Scheffman, *Best Practices for Data, and Economics and Financial Analyses in Antitrust Investigations* (Apr. 2002) (unpublished manuscript), *available at* http://www.ftc.gov/be/ftcbebp.pdf (providing guidelines on economic analysis for meeting with FTC Bureau of Economics); David Scheffman & Mary Coleman, *FTC Perspectives on the Use of Econometric Analyses in Antitrust Cases* 9 (undated) (draft document), *available at* http://www.ftc.gov/be/ftcperspectivesoneconometrics.pdf (discussing the use of scanner data for demand

geographic area studied, the shorter the time horizon, and the less likely that contingencies and random factors will play a material role in making outcomes indeterminate.[311] But as one recent survey observed, several limitations exist with the current economic models.[312] Data may be unavailable or limited in some industries, the models' assumptions are invalid, or the models' neglect non-quantifiable and long-run competitive effects, including the merger's impact on innovation.[313] Although merger simulations can inform antitrust analysis, the U.S. antitrust agencies wisely "do not treat merger simulation evidence as conclusive in itself."[314] With the rise of global trade, we are trending toward greater uncertainty, where contingencies or unforeseen factors across the globe (e.g., a string of worker suicides in Foxconn's factory in Shenzhen, China) can affect domestic competitors (like Apple) that rely on low-cost labor.[315]

A third risk under Scenario IV arises when the bounded rational government ignores non-quantifiable and long-run competitive effects, such as systemic risk. The government discounts or ignores evidence that its economic theory cannot

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estimation and other relevant economic analyses); *see also* FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 6, 8, 9, 14 (Mar. 2006), *available at* http://www.usdoj.gov/atr/public/guidelines/215247.pdf (describing use of scan data to estimate demand elasticities for branded consumer products).

311 NORTH, *supra* note 41, at 20-22. For example, suppose two leading manufacturers of white pan bread decide to merge. Using retailers' historic in-store scan data, econometricians can examine what impact changes in the retail price of one brand, such as Wonder white pan bread, had on the unit sales of other branded or private label products, such as rye bread, bagels, or wheat bread. Using the scan data for white pan bread purchases in a specific market, such as Chicago, an econometrician may predict accurately the price of white bread shortly after the merger. But predicting bread prices across the United States (or globally) over a longer time period invites uncertainty as unforeseen events may affect demand, such as diet fads or supply.

312 *See* Oliver Budzinski & Isabel Ruhmer, *Merger Simulation in Competition Policy: A Survey*, 6 J. COMPETITION L. & ECON. 277 (2009).

313 *Id.*

314 HORIZONTAL MERGER GUIDELINES, *supra* note 61, at 21.

315 Kathrin Hille, *Foxconn to Shift Some of Apple Assembly*, FIN. TIMES, June 29, 2010, at 1, *available at* http://www.ft.com/cms/s/2/2429f498-82fd-11df-8b15-00144feabdc0.html#axzz1YjzSEEJl.

explain, or scenarios that its theory does not contemplate.[316] The financial services industry during the 1990s and early 2000s, for example, underwent a mega-merger wave.[317] As a Department of Justice official noted, "[A] number of individual mergers during the 1990s ranked among the largest U.S. bank mergers ever, in terms of the real value of assets involved, and in terms of the share of total U.S. bank assets accounted for by the merging banks."[318] The financial sector was becoming more concentrated, and its profits were growing faster.[319] One mega-merger was between The Travelers Group, Inc. and Citicorp. The $70 billion merger created the world's largest commercial banking organization, with total consolidated assets of approximately $751 billion.[320] During its merger review, the Justice Department "heard numerous complaints that Citigroup would have an undue aggregation of resources—that the deal would create[] a firm *too big to be allowed to fail*."[321] But the Department "essentially viewed this as primarily a regulatory issue to be considered by the [Federal Reserve Board]."[322] The financial services industry was becoming more concentrated as a consequence of the merger wave among large financial institutions.[323] But the DOJ never

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[316] *See, e.g.*, CASSIDY, *supra* note 86, at 221-34 (discussing Federal Reserve Chairman Alan Greenspan's failure to take seriously the concept of market failure).

[317] JOHNSON & KWAK, *supra* note 7, at 84-85. JPMorgan Chase, for example, was the result of mergers with "Chemical Bank and Manufacturers Hanover (1991), First Chicago and National Bank of Detroit (1995), Chemical and Chase Manhattan (1996), Bank One and First Chicago (1998), J.P. Morgan and Chase Manhattan (2000), and JPMorgan Chase and Bank One (2004)." *Id.*

[318] Robert Kramer, Chief, Litigation II Section, Antitrust Div., U.S. Dep't of Justice, "Mega-Mergers" in the Banking Industry, Address at the American Bar Associate Antitrust Section (Apr. 14, 1999), *available at* http://www.justice.gov/atr/public/speeches/214845.htm.

[319] JOHNSON & KWAK, *supra* note 7, at 85.

[320] Press Release, Fed. Reserve Bd., Order for Travelers Group and Citicorp Approving Formation of a Bank Holding Company and Notice to Engage in Nonbanking Activities, (Sept. 23, 1998) [hereinafter Fed. Reserve Citicorp Order], *available at* http://www.federalreserve.gov/boarddocs/press/BHC/1998/19980923/19980923.pdf.

[321] Kramer, *supra* note 318, at 6 (emphasis added).

[322] *Id.*

[323] Kenneth D. Jones & Tim Critchfield, *Consolidation in the U.S. Banking Industry: Is the "Long, Strange Trip" About to End?*, FDIC BANKING REV. (Jan. 19, 2006), *available at* http://www.fdic.gov/bank/analytical/banking/2006jan/article2/

considered systemic risk or how creating a firm too-big-and-integral-to-fail could distort competition. Its economic models mainly considered short-term price effects arising from the merger, namely whether Citicorp-Travelers, post-merger, could raise the price of its services in narrowly defined geographic markets. [324] In limiting its risk assessment to short-term price effects, the government can fail to see or consider the merger's impact on the efficiency, competitiveness, and stability of the overall financial system.

The financial markets, when viewed as a complex adaptive system, can become more vulnerable as one bank increases in size and becomes too-big-and-integral-to-fail.[325] This is not always apparent. During relatively calm periods, having large financial institutions can appear beneficial. If a peripheral bank is subject to a random shock, the network's health remains stable. Indeed, the larger banks may be credited for absorbing the shock.[326] "It is only when the hub—a large or connected financial institution—is subject to stress that network dynamics will be properly unearthed," said a Bank of England executive. "When large

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index.html ("Over the two decades 1984-2003, the structure of the U.S. banking industry indeed underwent an almost unprecedented transformation—one marked by a substantial decline in the number of commercial banks and savings institutions and by a growing concentration of industry assets among a few dozen extremely large financial institutions."). Between year-end 1984 and 2003, the number of banking and thrift organizations declined almost forty-eight percent from 15,084 to 7,842. *Id.* Mergers and acquisition accounted for most of this increased concentration. *Id.*

[324] The DOJ does not generally challenge mergers between firms dominant in different markets (for example, a bank dominant in the western United States merges with a dominant bank in the eastern United States). Kramer, *supra* note 318, at 7 (noting how the NationsBank and Bank of America mega-merger "was a classic market extension merger since NationsBank's operations focused generally on the east coast and south and Bank of America was largely on the west coast" so the merger's competitive issues for the DOJ involved only two states—New Mexico and Texas).

[325] Thomas J. Horton, *The Coming Extinction of Homo Economicus and the Eclipse of the Chicago School of Antitrust: Applying Evolutionary Biology to Structural and Behavioral Antitrust Analyses*, 42 LOY. U. CHI. L.J. 469 (2011) (an evolutionary biology perspective on why large economic concentrations, such as monopolies and oligopolies, are vastly overrated in terms of their overall efficiency and positive impacts on our economic system, and how the Chicago School underrates their dangerous impacts).

[326] CASSIDY, *supra* note 86, at 283 (recounting Greenspan's praise of large systemically important banks' use of credit derivatives to stabilize the banking system).

financial institutions came under stress during this crisis, these adverse system-wide network dynamics revealed themselves."[327]

Even if the government acknowledges systemic risks, the risks are often harder to quantify and thus easier to ignore. Under a total welfare analysis, the competition authority assesses a merger's risks (and costs) over the short-term (including its impact on consumer and producer surplus) and long-term (including its effect on the network's resilience).[328] Assessing the merger's short-term static price effects (e.g., whether the banks post-merger can raise rates for specific categories of borrowers) is often easier than assessing and quantifying the merger's long-term impact on the efficiency, competitiveness, and stability of the overall financial network. But if the government ignores the mega-merger's risks to the overall financial network's resilience, the merger analysis is incomplete and potentially flawed. This risk is compounded when the bounded rational government, overconfident that its merger analysis identifies all the significant anticompetitive risks, goes beyond approving mega-mergers that are viewed as market extensions (despite the long-term risks these mergers may pose) and seeks to dismantle any restraints on future industry concentration.[329]

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[327] Andrew G Haldane, Executive Director, Fin. Stability, Bank of Eng., Rethinking the Financial Network 11, Address at the Financial Student Association, Amsterdam (Apr. 2009), *available at* http://www.bankofengland.co.uk/publications/speeches/2009/speech386.pdf.

[328] Sally J. Goerner et al., *Quantifying Economic Sustainability: Implications for Free-Enterprise Theory, Policy and Practice*, 69 ECOLOGICAL ECON. 76, 77 (2009); Howard A. Shelanski, *Enforcing Competition During an Economic Crisis*, 77 ANTITRUST L.J. 229, 239-45 (2010).

[329] In the Citicorp/Travelers merger, a "significant number of other commenters" told the Federal Reserve that the merger violated the Glass-Steagall Act; they "urged the Board not to consider the proposal unless and until Congress amends the law to allow unlimited combinations of insurance, banking and securities businesses." Fed. Reserve Citicorp Order, *supra* note 320, at 6. Travelers CEO Sanford Weill hoped his mega-merger would push Congress to remove the barriers under the Glass-Steagall Act. *The NewsHour with Jim Lehrer: Financial Powerhouse* (PBS television broadcast Apr. 7, 1998), *available at* http://www.pbs.org/newshour/bb/business/jan-june98/merger_4-7.html. Congress did so a year later with the Gramm-Leach-Bilely Act of 1999. The 1999 law repealed the Glass-Steagall Act's restrictions on bank and securities-firm affiliations, and amended the Bank Holding Company Act to permit affiliations among financial services companies, including banks, securities firms and insurance companies. *Glass-Steagall Act (1933)*, N.Y.TIMES.COM,

A fourth risk under Scenario IV is when a bounded rational government is overconfident in its ability to regulate firms deemed too-big-and-integral-to-fail. For example, commenters warned the Federal Reserve Board that the Citicorp-Travelers mega-merger "would result in an undue concentration of resources and in an organization that is both 'too big to fail' and 'too big to supervise.'"[330] But in permitting the merger, the Federal Reserve responded that the nation's largest corporate merger "would have a de minimis effect on competition."[331] The Federal Reserve rejected the argument that the absolute or relative size of Citicorp would adversely affect the market structure.[332] It failed to see how "the size or breadth of Citicorp's activities would allow it to distort or dominate any relevant market."[333] Finally, the Federal Reserve, with its "extensive experience supervising Citicorp," confidently stated that it "developed a comprehensive, risk-based supervision plan" to effectively monitor Citibank; moreover, other government agencies, like the Securities and Exchange Commission, would "assist the Board in understanding Citigroup's business and the risk profiles of those businesses."[334]

As the merger played out over the next decade, Citigroup senior management and the government demonstrated their poor understanding of the risk profiles of the collateralized debt obligation (CDO) business.[335] In 2008, Citibank, and other financial institutions considered too-big-and-integral-to-fail, were (or were perceived to be) failing and received an implicit

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http://topics.nytimes.com/topics/reference/timestopics/subjects/g/glass_steagall_act_1933/index.html (last visited Nov. 1, 2011).

[330] Fed. Reserve Citicorp Order, *supra* note 320, at 74.

[331] *Id.* at 75.

[332] *Id.* at 85.

[333] *Id.* at 86.

[334] *Id.*

[335] After Citigroup senior executives testified before the Financial Crisis Inquiry Commission investigators on the cause of Citigroup's 2008 bailout, the Commission's Chairman, Phil Angelides, said, "One thing that is striking is the extent to which senior management either didn't know or didn't care to know about risks that ultimately helped bring the institution to its knees." Bradley Keoun et al., *Citigroup "Liquidity Puts" Draw Scrutiny from Crisis Inquiry*, BLOOMBERG, Apr. 13, 2010, http://www.bloomberg.com/news/2010-04-13/citigroup-s-14-billion-liquidity-put-loss-is-focus-of-u-s-crisis-panel.html.

government guarantee. Citigroup, an early recipient of the government bailout, received a $45 billion emergency infusion and $301 billion of government asset insurance, which was the largest taxpayer bailout for any U.S. bank.[336]

3. Policy Alternatives under Scenario IV

Given Scenario IV's competitive dynamics, one could argue that the government cannot accurately predict the merger's likely competitive effects. Accordingly, the government should abstain from predictions and challenge only those consummated mergers where significant anticompetitive effects have manifested.[337] But waiting post-merger for anticompetitive effects can foreclose effective relief (one reason why Congress facilitated pre-merger review).[338]

Moreover, bounded rationality differs from ignorance. At times, the problems are apparent. One need not be a *Homo*

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[336] *See Where is the Money?: Eye on the Bailout*, PROPUBLICA, http://bailout.propublica.org/entities/96-citigroup (last visited Nov. 1, 2011); *see also* CASSIDY, *supra* note 86, at 330 (noting that although politically unpalatable to the Bush Administration, nationalizing Citibank might have been cheaper than insuring its toxic assets); Keoun et al., *supra* note 335.

[337] *See, e.g.*, General Tel. Co. of the Sw. v. United States, 449 F.2d 846, 863 (5th Cir. 1971) ("In a complex and dynamic industry such as the communications field, it cannot be expected that the agency charged with its regulation will have perfect clairvoyance. . . . 'Hardship must at times result from postponement of the rule of action till a time when action is complete. It is one of the consequences of the limitations of the human intellect and of the denial to legislators and judges of infinite prevision.'" (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 145 (1921))).

[338] Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (2006); United States v. Computer Assocs. Int'l, Inc., Civ. Action No. 01-02062(GK), 2002 WL 31961456 (D.D.C. Nov. 20, 2002) (discussing policies underlying the pre-merger notifications requirements of the HSR Act); *see also* T-201/04, Microsoft Corp. v. Comm'n, 2007 E.C.R. II-3601, 2007 WL 2693858 ("If the Commission were required to wait until competitors were eliminated from the market, or until their elimination was sufficiently imminent, before being able to take action under Article 82 EC, that would clearly run counter to the objective of that provision, which is to maintain undistorted competition in the common market and, in particular, to safeguard the competition that still exists on the relevant market."); Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement Case*, 77 OR. L. REV. 1383, 1397-98 (1998). After the merger, employees may leave the company, manufacturing plants may have closed, the former competitors' goods and services may be a shadow of their former competitive might, and the merged entities' operations may be so integrated that structural remedies are impractical.

Economicus to see America's obesity problem. A bounded rational government can assist consumers', firms', and its own learning processes by improving the feedback loop. The government can disseminate information of market participants' trial-and-error experiments, and assist participants in integrating and applying that knowledge. Advances in telecommunications, for example, have helped farmers in India to not only learn the latest crop prices but to also increase their yields and efficiencies by learning from researchers' and other farmers' lessons through trial-and-error.[339] Farmers use cell phones to learn how to use less seed, fuel, and fertilizers, while reaping bigger harvests.[340]

The government can also opt for structural safeguards to promote industry diversity and stability. As the U.S. government found after the financial crisis, "[r]estrictions on future growth by acquisition of the largest financial companies ultimately will prevent acquisitions that could make these firms harder for their officers and directors to manage, for the financial markets to understand and discipline, and for regulators to supervise."[341]

On the one hand, systemic risk is not limited to highly concentrated markets. Small bounded rational banks can similarly ignore their activities' riskiness.[342] Several bank failures can have a cascading effect when banks respond similarly to cripple the banking system.[343] On the other hand, a larger, more diverse pool, while susceptible to herding, "leads to a higher probability that in the case of an exogenous shock one of these technologies will provide an appropriate solution."[344] Consequently, perhaps the best recipe for confronting uncertainty

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[339] Richard Stone, *News: Dialing Up Knowledge—And Harvests*, SCI., Feb. 12, 2010, at 808.

[340] *Id.*

[341] FIN. STABILITY OVERSIGHT COUNCIL, STUDY & RECOMMENDATIONS REGARDING CONCENTRATION LIMITS ON LARGE FINANCIAL COMPANIES (Jan. 2011), *available at* http://www.treasury.gov/initiatives/Documents/Study%20on%20Concentration%20Limits%20on%20Large%20Firms%2001-17-11.pdf (discussing benefits of the concentration limits under section 622 of the Dodd-Frank Wall Street Reform and Consumer Protection Act).

[342] Indeed, rational banks may engage in risky behavior or risk the erosion of their stock price over the short-term.

[343] Schweitzer et al., *supra* note 294, at 424-25; STIGLITZ, *supra* note 2, at 149.

[344] Kerber, *supra* note 203, at 9.

and systematic risk is maintaining diversity and "institutions that permit trial and error experiments to occur."[345]

Ultimately, a key issue under Scenario IV is one of institutional design. Does the government have sufficient incentive to recognize its bounded rationality, to continually learn and update its beliefs, and to update its policies accordingly? One impediment the government faces is the behavioral bias of belief perseverance'. Confident in the predictive quality of its competition policies, the government may argue that there is no need to empirically test whether its predictions are indeed accurate; it also ignores or discounts competitive behavior that its economic theories cannot explain.

A second impediment is incentives. Bounded rational firms at least have an incentive to improve their rationality and willpower when debiasing provides a competitive advantage. The government lacks this incentive. At times, competition agencies compete for prestige, resources, and cases (such as the Federal Trade Commission and the Justice Department over mergers). But inter-agency competition does not necessarily increase political accountability that reduces biases and heuristics.[346] The competition agency may attract inquisitive dynamic leaders who want to critically test the economic theory's assumptions. But others in government will likely resist. This critical assessment diverts staff and funding from immediate prosecutions. Prosecutions bring publicity, which the agency uses to justify its existence. The rewards from institutional learning accrue over the long-term, often after the political appointees leave office. Moreover, some economic experts and lawyers whose livelihood depends on rational choice theory (and firms that benefit from these antitrust policies) will discourage such empiricism as a waste of time and resources. Consequently, government institutions often lack sufficient incentives to continually test

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[345] LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 11 (2d ed. 2006) (unconcentrated markets reduce the risk of costly error); NORTH, *supra* note 41, at 163.

[346] When test subjects were expected to defend their judgments to their peers, subjects chose more complex and time-consuming decision-making strategies. Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 481 (1990).

their assumptions, to retrospectively examine the efficacy of their actions, and to use these findings to update their policies.[347]

Competition agencies need patient gardeners, who experiment, monitor, and update the economic theories. But structural mechanisms are needed to ensure that the agencies hire and support these gardeners who tend to antitrust policy. One mechanism is to increase the government's accountability. This can be done directly, as in the European Union, where the European Commission's inaction (e.g., not enjoining a merger) can be challenged in court. But this assumes that the court will strike the right balance in deference.

A second mechanism is to require the competition agencies to explain why they did not challenge mergers, subject to extended review.[348] The competition agency should explain each critical assumption it made in determining that the merger was unlikely to lessen competition.[349] The agencies should be required to undertake and publish more post-merger reviews, to test whether these assumptions indeed were valid. At times, enforcement actions lead to undesirable outcomes. High criminal fines can hamper competition. Divestitures of assets, as part of merger review, may later prove inadequate. Behavioral remedies may unintentionally lead to anticompetitive results.[350] Subjecting the

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[347] NORTH, *supra* note 41, at 68.

[348] The U.S. competition agencies at times issue closing statements, but the analysis can vary considerably. *Compare* Press Release, Fed. Trade Comm'n, Statement of the Federal Trade Commission Concerning Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corporation/P&O Princess Cruises plc, FTC File No. 021 0041 (Oct. 4, 2002), *available at* http://www.ftc.gov/os/2002/10/cruisestatement.htm, *with* Press Release, U.S. Dept. of Justice, Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigation of the Merger of Delta Air Lines Inc. and Northwest Airlines Corporation, Oct. 29, 2008, *available at* http://www.justice.gov/opa/pr/2008/October/08-at-963.html.

[349] If the agency believes that the merger is anticompetitive, but feels that it would lose in court, the agency should say so. Otherwise, the courts and Congress will be unaware of the unintended consequences their current legal standard is causing.

[350] For example, making price information public may make collusion easier. *See* Maurice E. Stucke, *Evaluating the Risks of Increased Price Transparency*, 19 SPRING ANTITRUST 81 (2005), *available at* http://ssrn.com/abstract=927417; OECD'S DIRECTORATE FOR FIN., FISCAL AND ENTER. AFFAIRS, COMM. ON COMPETITION LAW & POLICY, COMPETITION POLICY ROUNDTABLE: PRICE TRANSPARENCY 205-09 (Sept. 11, 2001), *available at* http://www.oecd.org/dataoecd/52/63/2535975.pdf (discussing benefits and detriments of price transparency in the United Kingdom).

competition agencies' actions to external review and criticism, such ex post review, would require greater accountability by those entrusted with enforcing the antitrust laws.

Third, the competition authorities should periodically commission empirical research to test the continuing validity of the assumptions underlying their policies. The government agencies "have the ability to study over time how individuals behave in certain settings,"[351] which is exactly what the U.K.'s Office of Fair Trading is doing with pricing frames.[352]

CONCLUSION

To design better competition policies, we need to understand the limits of our current policies. Thus, as the Chicago School recognized, defining competition and the goals of competition law are paramount. This is because "[e]verything else follows from the answer we give."[353] Going forward, competition authorities must first reevaluate their theory of competition. As this article shows, no satisfactory definition of competition exists. Some consider competition as an idealized end-state (such as static price competition under the economic model of perfect competition); others view competition as a dynamic process.

Any theory of competition will depend on its premises. Altering one set of assumptions (rationality of firms and consumers) expands the current theories of competition into the frontiers of Scenarios II, III, and IV. Altering the assumption of the government's relative rationality adds additional policy concerns.

One cannot understand competition deductively from the assumption of rational market participants with perfect willpower. Nor can one assume that every market is confined to

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[351] Rosch, Next Challenges, *supra* note 63, at 17.

[352] *See* OFFICE OF FAIR TRADING, *supra* note 135.

[353] BORK, *supra* note 8, at 50. Not surprisingly, Bork, in his paradigm-shifting book, the ANTITRUST PARADOX, first defined competition, then outlined his goals of competition law, from which his legal standards to achieve these goals arose. After rejecting the definitions of competition as rivalry, perfect competition ("utterly useless as a goal of law"), and protection of fragmented markets, Bork settled on his definition of competition, namely as "a shorthand of expression of consumer welfare," which in turn comported with his goal of competition law. *Id.* at 57-61.

one scenario. In markets with sophisticated participants dealing in homogenous goods where price rather than innovation is key, competition can resemble Scenario I. Other markets can resemble Scenario IV, where "competition is a method for solving knowledge problems through a trial and error process."[354] Nor are industries confined to one scenario. Industries can originate in Scenario IV when uncertainty exists over consumers' preferences and how the new technology benefits consumers.[355] Various experimental designs are at play until through trial-and-error (or network effects) a dominant design emerges. As the industry matures, consumers and manufacturers experiment less, variety decreases, and competition turns more on price.[356]

Competition is better understood inductively through empirical research. In analyzing competition under the frontiers of Scenarios II, III, and IV, policymakers will see beyond static price competition in narrowly defined antitrust markets. Issues of systemic risk, behavioral exploitation, herding behavior, and overconfidence bias will increase in importance. Antitrust analysis accordingly will shift from narrowly defined markets to vertical and horizontal competition among larger units, systems, platforms, and alliances in which potential competition plays an important analytical role.

Going forward, there will unlikely be any unifying definition of competition. Competition, like any complex system, is incompressible, in that it is "impossible to account for the system in a manner that is less complex than the system itself."[357] Once policymakers relax the premises of their theories of competition, they will encounter greater complexity. They will increasingly

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[354] Kerber, *supra* note 203, at 5.

[355] Richard R. Nelson & Sidney G. Winter, *Evolutionary Theorizing in Economics*, 16 J. ECON. PERSP. 23, 35 (2002).

[356] Grant Miles et al., *Industry Variety & Performance*, 14 STRATEGIC MGMT. J. 163, 167 (1993) (discussing product life cycle); BEINHOCKER, *supra* note 298, at 254-57; Nelson & Winter, *supra* note 355, at 36.

[357] Organisation for Econ. Co-operation and Dev., *A Framework to Measure the Progress of Societies: Statistics Directorate* 13 n.8 (OECD Statistics Working Paper Series, Paper No 34, July 12, 2010), *available at* http://www.politiquessociales.net/IMG/pdf/framework.pdf.

perceive competition as an often unpredictable, dynamic process, not easily subject to mathematical modeling.

One might ask whether defining competition, given the complexities, is necessary. But one cannot understand what goals are achievable from a competition policy, unless one better comprehends how competition works. And one cannot understand competition, if one relies on a flawed assumption of rationality.

Consequently, the first order is to understand how competition works in particular industries and to reevaluate the premises of our theory of competition, including the rationality of the market participants and the interplay among government institutions and informal social, ethical, and moral norms. Although competition agencies are increasingly sharing market studies,[358] this remains competition policy's weakness.[359]

In revisiting their theory of competition, including the underlying assumptions, competition authorities should look beyond antitrust's current neoclassical economic theories and consider the developments in several inter-disciplinary fields, such as behavioral economics, new institutional economics, and evolutionary economics. The literature can provide a richer understanding of the observed marketplace behavior, how consumers choose, and additional remedial options, including default options. Ultimately, these interdisciplinary economic theories can improve antitrust analysis by helping us understand *first*, what competition is; *second*, what competition can achieve for us; and *third*, how competition can promote the good life.

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[358] Int'l Competition Network, *Market Studies Good Practice Handbook* (ICN Advocacy (Market Studies Project) Working Group, Apr. 2010), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc646.pdf.

[359] Kerber, *supra* note 203, at 6 ("no serious theoretical and empirical economic research" has been undertaken about Hayek's concept of competition as a discovery procedure).

WHEN CHILDREN'S RIGHTS "COLLIDE": FREE SPEECH VS. THE RIGHT TO BE LET ALONE IN THE CONTEXT OF OFF-CAMPUS "CYBER-BULLYING"

*Christine Metteer Lorillard**

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INTRODUCTION

> IAGO: Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls:
> Who steals my purse steals trash: 'tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name,

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> Robs me of that which not enriches him,
> And makes me poor indeed.
>
> William Shakespeare, Othello act 3, sc. 3, 155–61.

> PRESIDENT ANDREW SHEPHERD: America isn't easy. America is advanced citizenship. You gotta want it bad, 'cause it's gonna put up a fight. It's gonna say "You want free speech? Let's see you acknowledge a man whose words make your blood boil, who's standing center stage and advocating at the top of his lungs that which you would spend a lifetime opposing at the top of yours. You want to claim this land as the land of the free? Then the symbol of your country can't just be a flag; the symbol also has to be one of its citizens exercising his right to burn that flag in protest." Show me that, defend that, celebrate that in your classrooms. Then, you can stand up and sing about the land of the free.
>
> Portrayed by Michael Douglas, *The American President* (Castle Rock Entertainment 1995).

These two passages are not only familiar to many, but also express the beliefs many of us share and hold dear. Yet, to some degree, they are antithetical. At the very least, they set up the tension between the right of privacy[1] and the First Amendment right of free speech. But they also underlie concerns that have arisen about attempts to regulate internet expression,[2] especially

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[1] William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 398 (1960) ("The interest protected is that of reputation, with the same overtones of mental distress that are present in libel and slander. It is in reality an extension of defamation, into the field of publications that do not fall within the narrow limits of the old torts, with the elimination of the defense of truth." footnote omitted)).

[2] *See, e.g.*, Stephen Lendman, *Internet Threatened by Censorship, Secret Surveillance, and Cybersecurity Laws*, FOG CITY J. (May 22, 2009), http://www.fogcityjournal.com/wordpress/2009/05/Internet-threatened-by-censorship-secret-surveillance-and-cybersecurity-laws/. Lendman argues:

> At a time of corporate dominated media, a free and open Internet is democracy's last chance to preserve our First Amendment rights without which all others are threatened. Activists call it Net Neutrality. Media scholar Robert McChesney says without it "the Internet would start to look like cable TV (with a) handful of massive companies (controlling) content" enough to have veto power over what's allowed and what it costs. Progressive

that of school children. What happens when these rights collide at school?

A recent case from the Central District of California, *J.C. ex rel. R.C. v. Beverly Hills Unified School District*,[3] illustrates the problem and has gotten a great deal of attention from the media, mostly arguing for the need to protect students from cyber-bullying by other students,[4] and from free speech advocates, arguing for robust constitutional protections of student internet speech originating off campus.[5] *Beverly Hills* is unique, however, because unlike the eleven other cases of student off-campus internet expression that eventually makes its way onto campus,[6] *Beverly Hills* did not involve cyber-harassment of school teachers or administrators, but true cyber-bullying of another student in the same school.[7]

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web sites and writers would be marginalized or suppressed, and content systematically filtered or banned.

Id.

[3] 711 F. Supp. 2d 1094 (C.D. Cal. 2010).

[4] Victoria Kim, *A Right for Students to be Cruel Online?* L.A. TIMES, Dec. 13, 2009, at A1 (responding to the as yet unpublished decision of Steven V. Wilson in *Beverly Hills*); *see also* Nancy Willard, *There Is No Constitutional Right to be a Cyberbully: Analysis of* J.C. v. Beverly Hills Unified Sch. Dist., CENTER FOR SAFE AND RESPONSIBLE INTERNET USE (Dec. 16, 2009), http://www.cyberbully.org/documents.

[5] Frank LoMonte, *Beverly Hills (Speech) Cop I: Court slams schoolhouse gate on school discipline of YouTube posting*, STUDENT PRESS LAW CENTER (Dec. 19, 2009), http://www.splc.org/wordpress/?p=361.

[6] *See* discussion *infra* Part II. The closest case seems to be *Coy v. Board of Education*, 205 F. Supp. 2d 791 (N.D. Ohio 2002). In that case, the court considered whether a student's First Amendment rights were violated when he created a website at home, containing a "losers" list of three fellow students, with several insulting sentences written under each student's picture. The creator later accessed his own website in class on a school computer, in violation of the school's internet use policy, but apparently never showed the site to any other students, and no evidence showed that any students ever saw the site. The court characterized it as a "private viewing of his own website." *Id.* at 799. While the court found that *Tinker*'s substantial disruption standard would apply to such expression, and found that accessing the website had no effect upon the "school district's ability to maintain discipline in the school," the court found that there was a material issue of fact on the motive of the school's subsequent discipline of Coy—the content of his website or a violation of the school's internet policy. The court refused to grant summary judgment for either party. *Id.* at 801.

[7] Some commentators define cyberbullying broadly as the "use of information and communication technologies . . . to support deliberate, repeated, and hostile behavior by an individual or group that is intended to harm *others*." Darryn Cathryn Beckstrom, *State Legislation Mandating School Cyberbullying Policies and the Potential Threat to*

In *Beverly Hills*, Judge Stephen Wilson meticulously outlined Supreme Court student speech cases, as well as application of those decisions by lower courts, including several of the cases involving the Internet. He determined that the substantial disruption standard established in *Tinker v. Des Moines Independent Community School District*[8] "applies to both on-campus and off-campus speech," yet ultimately found insufficient evidence of substantial disruption, or any foreseeable risk thereof, despite the vitriolic name-calling and profanity that caused the targeted student severe emotional distress and anxiety about attending class.[9]

The Internet creates a challenging environment in which children's rights of privacy and free speech do not easily co-exist. And, since the "well-being of children depends to a large extent on their rights and protections under the law,"[10] both rights need clear constitutional parameters. The challenge is to balance a child's right to be let alone with a child's equally compelling right of freedom of expression.[11] Although the rights are those of the child,[12] protecting those rights supposes an obligation on the part of others—parents or the state.[13] Outside school, parents may

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Students' Free Speech Rights, 33 VT. L. REV. 283, 286 (2008) (emphasis added). However, there is, as Renee Servance points out, an important distinction between "cyberbullying," which is the use of the Internet by students to bully peers, and "cyber-harassment," which is use of the Internet by students to harass adult members of the school community. Renee L. Servance, *Cyberbullying, Cyber-harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1219 (2003); *see also* Willard, *supra* note 4 (arguing that the opinion in *Beverly Hills* went "off-track" because of "the limited legal guidance related to the constitutionality of a school response when a student is bullying, or being verbally aggressive, towards another student").

[8] 393 U.S. 503 (1969).

[9] *Beverly Hills*, 711 F. Supp. 2d at 1108.

[10] *See* JOAN CATHERINE BOHL & CHRISTINE METTEER LORILLARD, CHILDREN AND THE LAW: THE COMPETING RIGHTS, PRIVILEGES, AND INTERESTS OF CHILDREN, PARENTS, AND THE STATE ix (2010).

[11] *See* Alison King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 846 (2010); Servance, *supra* note 7, at 1224.

[12] *See* Cynthia Price Cohen, *The Developing Jurisprudence of the Rights of the Child*, 6 ST. THOMAS L. REV. 1, 19 (1993).

[13] *See* Elisa Poncz, *Rethinking Child Advocacy After* Roper v. Simmons*: "Kids are Just Different" and "Kids are Like Adults" Advocacy Strategies*, 6 CARDOZO PUB. L.

protect their children, and in fact, have a constitutional right to discretion in raising their children.[14] But at school, during school hours, or off campus after hours during school-sponsored events, parents may not be able to defend the rights of their children. In these instances, under the doctrine of *parens patriae*, the state, often in the form of its public schools, is the "fallback" for the family and has an interest in the welfare of its children, an interest in promoting and protecting a child's best interests.[15]

To that end, several Acts have been proposed to protect children from online harassment and bullying. In 2000, the Children's Internet Protection Act (CIPA) was enacted by Congress to address:

> [C]oncerns about access to offensive content over the Internet on school and library computers. CIPA imposes certain types of requirements on any school or library that receives funding for Internet access or internal connections from the E-rate program – a program that makes certain communications technology more affordable for eligible schools and libraries.[16]

Yet similar regulation has drawn criticism as an abridgement to First Amendment rights.[17] In 1998, the Child Online Protection Act (COPA) was created but quickly blocked by federal courts as an unconstitutional infringement of speech.[18]

POL'Y & ETHICS J., 273, 276 (2008); Lee E. Teitelbaum, *Children's Rights and the Problem of Equal Respect*, 27 HOFSTRA L. REV. 799, 805 (1999).

[14] In *Layshock v. Hermitage School District*, parents of a student disciplined for creating a fake internet profile of the principal of his school filed a Due Process claim against the school, alleging that the school's punishment of their son interfered with their "parental right of determining how best to raise, nurture, discipline and educate their child." 593 F.3d 249, 255 (3d Cir. 2010). However, the Third Circuit ultimately found that the parents' Due Process rights had not been violated. *Id.* at 264; *see also* Duffy B. Trager, *New Tricks for Old Dogs: The* Tinker *Standard Applied to Cyber-Bullying*, 38 J. L. & EDUC. 553, 556 (2009); Poncz, *supra* note 13, at 281.

[15] BOHL & LORILLARD, *supra* note 10, at x; *see also* Poncz, *supra* note 13, at 281 (citing the state's obligation to act in children's best interests by setting limits on curfew, driving, smoking, etc.).

[16] *Guide: Children's Internet Protection Act*, FED. COMMS. COMMISSION, http://www.fcc.gov/guides/childrens-internet-protection-act (last visited Oct. 10, 2011).

[17] *See, e.g.*, Lendman, *supra* note 2.

[18] *See id.* ("In 1998, the Child Online Protection Act (COPA) passed, but was blocked by federal courts as an infringement of free speech and therefore

The Internet, therefore, has created a dilemma for schools, which are charged with protecting students from predatory practices and inappropriate content while also honoring students' First Amendment rights to freedom of expression.[19] Are schools that punish "cyber-bullying" by one student directed at another student in violation of that student's First Amendment right of free expression when such expression originates off campus? Or is the state, through its schools, acting in its *parens patriae* capacity to protect "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone,"[20]—in this instance a student's right to be free from bullying that has had devastating consequences?[21] Additionally, every child has a "state-created property right to an education,"[22] and any expression that interferes with a student's "educational performance"[23] and the right to feel secure while receiving her

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unconstitutional and unenforceable. In 1999, the law was struck down at the Appellate Court level, but it stayed on the books. In 2002, the Supreme Court reviewed the ruling and returned the case for reconsideration. It remained blocked. Then in March 2003, the Appellate Court again ruled it unconstitutional on the grounds that it would hinder protected adult speech . . . .").

[19] Kathryn S. Vander Broek, Steven M. Puiszis, & Evan D. Brown, *Schools and Social Media: First Amendment Issues Arising from Student Use of the Internet*, 21 No. 4 INTELL. PROP. & TECH. L.J. 11, 11 (2009). Renee Servance also notes that schools can be sued for inaction in the case of student against student harassment, citing Columbine as an example. Servance, *supra* note 7, at 1215; *see also* Trager, *supra* note 14, at 560 (citing Title IX liability imposed for a school's failure to address cyber-bullying in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999)).

[20] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[21] *See generally* Beckstrom, *supra* note 7, at 284 (citing several instances of student victims of cyber-bullying committing suicide). The problem is so pervasive, that at the time of this writing, a new suicide has been reported, albeit by a university student: "NEW BRUNSWICK, N.J. (CBS/AP) Tyler Clementi committed suicide Sept. 22, apparently after discovering that his Rutgers University roommate, Dharun Ravi, and friend Molly Wei, live-streamed Clementi in a sexual encounter with another male student without his knowledge, a lawyer for the Clementi family announced late Wednesday." Carlin DeGuerin Miller, *Tyler Clementi Suicide: Lawyer Confirms Student's Suicide, Molly Wei and Dharun Ravi Face Charges for Sex Tape*, CBS NEWS (Sep. 29, 2010, 6:54 PM), http://www.cbsnews.com/8301-504083_162-20018088-504083.html.

[22] Martha McCarthy, *Student Expression That Collides With The Rights of Others: Should the Second Prong of* Tinker *Stand Alone?* 240 EDUC. L. REP. 1, 15 (2009). The Supreme Court has found a "property interest in educational benefits." Goss v. Lopez, 419 U.S. 565, 576 (1975).

[23] Saxe v. State College Area Sch. Dist., 240 F.3d 200, 215 (3d Cir. 2001).

education[24] must be balanced against First Amendment protection for internet expression about another student, created off campus but making its way onto campus.

The Supreme Court has yet to consider a case involving student speech online, either on or off campus,[25] but the Court has set some parameters. First, the Court begins with the premise that children are "clearly persons"[26] entitled to constitutional protection. As such, the Supreme Court declared in *In re Gault*, that "neither the Fourteenth Amendment nor Bill of Rights is for adults alone."[27] Subsequently, in *Tinker*, a case that has been extolled as the "zenith of children's rights,"[28] the Court upheld students' First Amendment rights to wear black armbands to school in protest of the Vietnam war, stating that "students [do not] . . . shed constitutional rights . . . at the schoolhouse gate."[29] However, students *have* shed at least one right "at the schoolhouse gate." By virtue of their confinement to the custodial control of others, in this instance compulsory school attendance required by the states, students are deprived of a liberty interest guaranteed to all adults by the Due Process Clause.[30] As Emily Buss has observed, such a considerable diminution of personal rights should perhaps indicate an enhancement of children's other rights while within the schoolhouse gate.[31]

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[24] Willard, *supra* note 4, at 4.

[25] Vander Broek et al., *supra* note 19, at 12 (observing that "existing Supreme Court decisions involve . . . fundamentally different forms of media and arose in a markedly different context"). An additional wrinkle is that parental and state's interests in the child may collide: many take the position that off-campus speech is a matter for parental discipline; others argue that criminal or tort action is the remedy for off-campus bullying. *See* Pike, *infra* note 32, at 990.

[26] Levy v. Louisiana, 391 U.S. 68, 70 (1968) (internal quotation marks omitted).

[27] *In re* Gault, 387 U.S. 1, 13 (1967).

[28] SARAH H. RAMSEY & DOUGLAS E. ABRAMS, CHILDREN AND THE LAW IN A NUTSHELL 22 (2d ed. 2003).

[29] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[30] Emily Buss, *Constitutional Fidelity Through Children's Rights*, 2004 SUP. CT. REV. 355, 362 (2005). The Supreme Court, in *Bethel School District No. 403 v. Fraser*, recognizes that parents and schools, *in loco parents*, need to protect school children that are "a captive audience." 478 U.S. 675, 684 (1986). The Ninth Circuit explained that school children are a "captive audience" because of "mandatory attendance requirements." Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178 (9th Cir. 2006).

[31] Buss, *supra* note 30, at 362.

The problem, as has often been observed, is that cyberspace blurs just where schoolhouse gates are[32] and which children they enclose, and "the Internet has literally (and legally) moved the schoolhouse gate to a student's home computer."[33] It is at this point that children's rights collide: a child engaging in otherwise protected expression off campus and from a non-school-owned computer would seem to have a solid First Amendment right to engage in such expression. However, when that expression makes its way onto campus, either intentionally brought there by the creator or foreseeably arriving there because the expression is about another student or member of the school community whom the speaker would not otherwise have known,[34] the Internet has created what has been called an on-campus "telepresence."[35] In such an instance, the courts must decide whether a pure right of free speech for off-campus expression takes precedence over a child's need for enhanced protection of her privacy right to be let alone, given the diminished right of liberty imposed by compulsory school attendance. In other words, when a child is exposed to cyber-bullying that was created off campus but reaches campus, and cannot shun the schoolhouse because the state requires her attendance, does the state, in the form of its schools, have the power to protect her privacy right by punishing her bullier?[36]

Schools have been afforded authority over other off-campus conduct, such as assault,[37] directing "fighting" words at a teacher

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[32] *See* Kenneth R. Pike, *Locating the Mislaid Gate: Revitalizing* Tinker *by Repairing Judicial Overgeneralizations of Technologically Enabled Student Speech*, 2008 BYU L. REV. 971, 973 (2008).

[33] Vander Broek et al., *supra* note 19, at 12.

[34] Renee L. Servance observes that most students create websites because of the relationships formed in school. "If the parties had not attended the same school the speech would not likely exist." Servance, *supra* note 7, at 1237.

[35] Pike, *supra* note 32, at 973.

[36] Susan P. Stuart, *Fun With Dick and Jane and* Lawrence*: A Primer on Educational Privacy as Constitutional Liberty*, 88 MARQ. L. REV. 563, 631 (2004) (Education occurs in a public setting that "challenges individual autonomy and respect for student's privacy.").

[37] Pollnow v. Glennon, 594 F. Supp. 220 (S.D.N.Y. 1984); Nicholas B. v. Sch. Comm. of Worcester, 587 N.E.2d 211 (Mass. 1992).

in a public place,[38] and even publishing a poem in a public paper that ridiculed a school and its functions.[39] Additionally, the Supreme Court has allowed abridgement of First Amendment rights when a true threat is made.[40] Student expression may be regulated and punished in five instances: when it occurs on campus and causes a substantial disruption[41] or collides with the rights of others,[42] when it occurs on campus and is lewd, vulgar, and offensive,[43] when it occurs on campus and bears the imprimatur of the school,[44] or when it occurs on campus and promotes drug use.[45]

However, a gray area exists[46] when the speech is not expressly threatening or when students have engaged in the

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[38] Fenton v. Spear, 423 F. Supp. 767, 769 & 773 (W.D. Pa. 1976) (school had authority to punish student who loudly called his teacher "a prick" in front of him in a public parking lot).

[39] State *ex rel.* Dresser v. Dist. Bd., 116 N.W. 232 (Wis. 1908).

[40] A true threat is one of the nine basic categories of unprotected speech. *See* Emily Gold Waldman, *Regulating Student Speech: Suppression Versus Punishment*, 85 IND. L.J. 1113, 1119 n.46 (2010).

[41] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513. This is the test used almost exclusively in internet expression cases to date.

[42] *Id.* at 514.

[43] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 696 (1986).

[44] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

[45] Morse v. Frederick, 551 U.S. 393 (9th Cir. 2007).

[46] *See, e.g.*, Dave Barry, *Third Circuit Vacates Decisions in Pair of Cases Involving Off-campus Online Student Speech and Grants Rehearing*, DREAM BELIEVE (Apr. 16, 2010, 12:55 AM), http://www.allplc.net/welcome/node/535. Barry summarized:

> On April 10, 2010, the U.S. Court of Appeals for the Third Circuit (PA, NJDE, VI) granted the motions for rehearing en banc in *J.S. ex rel. v. Blue Mountain School District* and *Layshock v. Hermitage School District*. Both cases involve students who were disciplined for using social networking sites to create parody profiles of a school official on an off-campus computer. In *Blue Mountain*, a three-judge panel split 2-1, ruling that a Pennsylvania school district did not violate a student's free speech rights when it disciplined her for creating, off campus, an online parody profile of her principal. In *Layshock*, on the other hand, a separate three-judge panel unanimously ruled that a Pennsylvania school district violated the free speech rights of a high school student who was disciplined for creating, off-campus, a parody online profile of the school's principal.

Id.

As this Article was being prepared for publication, the Third Circuit handed down decisions in both cases that find the student's First Amendment rights violated because the speech was created off campus and caused no substantial disruption on

speech outside of school walls, about people within them, foreseeably causing the speech to come onto campus. As Robert O'Neil, director of the Thomas Jefferson Center for the Protection of Free Expression, observed:

> [W]hen a true threat is made, and when speech is made using school computers, schools have clear authority to regulate students' speech. But when something falls in the gray area between an expressed threat and mere teasing, and students are accessing the Internet outside the school's walls, administrators are faced with a tricky calculus.[47]

In fact, the Second Circuit realized that "[i]f courts and legal scholars cannot discern the contours of First Amendment protections for student internet speech, then it is certainly unreasonable to expect school administrators . . . to predict where the line between on- and off-campus speech will be drawn in this new digital era."[48] In the end, which students will have to "shed their . . . rights . . . at the schoolhouse gate" is left in question, depending on the characterization of the speech as on-campus speech—governed by the four Supreme Court student speech cases—or off-campus speech; although the Court in *Tinker* also noted that a student's First Amendment right to free speech—at least on campus—may not "colli[de] with the rights of other students to be secure and to be let alone."[49]

What is now needed in order to uniformly and consistently protect both the rights of the speaker and the rights of the target is law directly focused on internet expression, especially expression created off campus but creating a "telepresence" on campus by targeting fellow students. Schools and courts should no longer have to guess at the constitutional parameters, or determine what is a "substantial" enough disruption before punishing students who cyber-bully. Proving that student internet

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campus. Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (en banc); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (en banc); *see also infra* note 373.

[47] *See* Kim, *supra* note 4 (quoting Robert O'Neil, director of Thomas Jefferson Center for the Protection of Free Expression).

[48] Doninger v. Niehoff, 594 F. Supp. 2d 211, 224 (D. Conn. 2009).

[49] *Tinker*, 393 U.S. at 506, 508.

expression created off campus is a true threat to a fellow student should not be the only way to preserve another child's right to be let alone.[50]

Part I of this Article considers the four Supreme Court cases governing student speech, as well as precedent governing the more amorphous right of privacy. Part II considers the lower courts' application of these precedents in the eleven student internet expression cases and attempts to synthesize their principles for regulating student off-campus cyber-expression. Part III considers the first case of a student-upon-student cyber-attack, *J.C. ex rel. R.C. v. Beverly Hills Unified School District*, and attempts to place it within the parameters established by the earlier Internet cases to consider the propriety of the opinion. This Article's Conclusion considers possible solutions to cases falling into the "gray area" of protected speech and concludes that courts must reconsider *Tinker*'s substantial disruption requirement as the *only* test in student-on-student cyber-bullying cases. When off-campus cyber expression is shown to have a sufficient "nexus" to the school in the form of being intentionally carried there by the creator, or foreseeably making its way onto campus because its target is a fellow student and it contains prurient content intended to attract student viewers, it should be viewed as on-campus speech that may be considered under *any* of the Supreme Court's exceptions to protected student speech, in order to protect against a "collision with the rights of other students to be secure and to be let alone."[51]

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[50] Another student-on-student internet expression case arose in the Los Angeles area at the same time as *Beverly Hills*. In *D.C. v. R.R.*, 106 Cal. Rptr. 3d 399 (Ct. App. 2010), the Second District California Court of Appeal considered the cyber-expression under a "true threat" analysis in the context of an anti-SLAPP (strategic lawsuit against public participation) statute intended to protect free speech, finding that such expression was never protected speech under the First Amendment and remanding to allow the hate crime suit to proceed, circumventing any necessity of protected speech within the schoolhouse gates.

[51] *Tinker*, 393 U.S. at 508.

I. COMPETING RIGHTS—PRIVACY VS. FREE SPEECH

A. The Right of Privacy

The right of privacy—for adults as well as for children—is an amorphous one, not specifically enumerated in the Bill of Rights but thought to come within its "penumbra."[52] But the right of privacy has, from its inception, been invoked in the context of new technologies that whittled away at personal rights. Louis Brandeis first discussed the concept in 1890 within the context of a recent innovative technology of the time, "[i]nstantaneous photographs," which allowed newspapers to publish photos and comments of individuals without first obtaining their consent.[53] In a passage that could be about the Internet, Brandeis wrote:

> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers . . . . The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.[54]

Years later, after becoming a Justice on the Supreme Court, Brandeis discussed the right to privacy in his dissent in *Olmstead*

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[52] Griswold v. Connecticut, 381 U.S. 479, 483 (1965) ("[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion. . . . [S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life.").

[53] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

[54] *Id.* at 196. Susan P. Stuart has found this article to "set out the rudiments of privacy as a positive, nearly quantifiable, concept for limiting the intrusion of technology . . . ." Stuart, *supra* note 36, at 593. State courts and legislatures soon adopted the concept.

v. United States, a case that upheld the right of Elliot Ness and his untouchables to wiretap the private telephone lines of bootleggers as long as it was done at a point between the defendants' homes and their offices,[55] again in response to a new technology. Brandeis stated:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect . . . . They conferred . . . the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.[56]

William Prosser later recognized that the law of privacy comprises four distinct kinds of invasion of four different interests of an individual:

> (1) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs[;] (2) Public disclosure of embarrassing private facts about the plaintiff[;] (3) Publicity which places the plaintiff in a false light in the public eye[;] and (4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[57]

In discussing the second, he observed that it was something "quite distinct from intrusion. The interest protected is that of reputation, with the same overtones of mental distress that are present in libel and slander. It is in reality an extension of defamation . . . ."[58] He warned, however, that the law of privacy was not intended "for the protection of any shrinking soul who is abnormally sensitive about such publicity. It is quite a different matter when the details of sexual relations are spread before the public gaze, or there is highly personal portrayal of his intimate private characteristics or conduct."[59]

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[55] Olmstead v. United States, 277 U.S. 438 (1928).

[56] *Id.* at 478 (1928) (Brandeis, J., dissenting).

[57] Prosser, *supra* note 1, at 389.

[58] *Id.* at 398.

[59] *Id.* at 397.

But it is generally agreed that the Supreme Court recognized a constitutional right of privacy for the first time in *Griswold v. Connecticut*, where the Court held that Connecticut's birth-control law, which made it a crime for anyone to give out information or instructions on the use of birth-control devices, intruded upon the right of marital privacy and reproductive rights.[60] The Court observed that "[w]e have had many controversies over these penumbral rights of 'privacy and repose' . . . [but many] cases bear witness that the right of privacy which presses for recognition here is a legitimate one."[61]

However, the right of privacy and the right to be let alone, while guaranteed to adults, are not necessarily co-extensive with the rights of children in public school. The Court *has* found that school children have a "liberty interest in [their] reputation," which is not "insubstantial,"[62] but also recognized the need to "strike [a] balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place . . . ."[63]

Thus, the Court abridged a child's Fourth Amendment rights, finding that a school's search of a student's purse must only be reasonable under the circumstances and is not dependent upon establishing probable cause.[64] The Court has also found that random drug testing as a requirement for interscholastic athletics did not violate a schoolchild's Fourth Amendment rights because

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[60] 381 U.S. 479, 485 (1965).

[61] *Id.* (citations omitted).

[62] Goss v. Lopez, 419 U.S. 565, 576 (1975) (finding school suspensions imposed for less than good cause may violate that interest).

[63] New Jersey v. T.L.O., 469 U.S. 325, 340 (1985).

[64] *Id.* at 341. The Court stated:

> [T]he accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.

Id.

the invasion of her privacy was "negligible."[65] The Court reasoned that "while children assuredly do not shed their constitutional rights . . . at the schoolhouse gate . . . the nature of those rights is what is appropriate for children in school."[66]

Parents, as part of their right to discretion in bringing up their children, also have the right and responsibility to invade a child's zone of privacy to protect their children or to provide them medical attention. The Supreme Court recognized that in these instances parents are "prime decision-makers."[67]

But even this right is not absolute, as the Court has carved out a narrow zone of privacy for a child mature enough to make a decision her parents would otherwise make for her. This "mature minor doctrine" arose in *Belotti v. Baird*, which found a mature minor's right of privacy demanded that she be allowed to make her own abortion decision.[68] Justice Stevens' concurrence pointed out that "[t]he constitutional right to make the abortion decision affords protection to both of the privacy interests recognized in this Court's cases: 'One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.'"[69] The Court, however, has never broadened that zone of privacy in medical decision-making beyond abortion.

These kinds of decisions by parents and the state have been found by the United Nations' Convention on the Rights of the

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[65] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 658 (1995); *see also* Bd. of Educ. of Indep. Sch. Dist. v. Earls, 536 U.S. 822 (2002) (upheld random urinalysis policy for competitive extracurricular activities beyond athletics).

[66] *Id.* at 656 (citation and internal quotation marks omitted).

[67] Parham v. J.R., 442 U.S. 584, 602 (1979) ("The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.").

[68] 443 U.S. 622 (1979). The Court found that when the state requires parental consent to a minor's abortion, the minor has the right to prove that "(1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests." *Id.* at 643-44.

[69] *Id.* at 655.

Child (CRC) to be part of a child's broad right to protection.[70] The CRC, which has been called the "gold standard"[71] and heralded as "a landmark in the history of childhood,"[72] has never been ratified by the United States, although it has been observed that the United States is "substantially in compliance . . . [at both the federal and] state level."[73] Article 16 of the CRC provides that "Children have a right to privacy. The law should protect them from attacks against their way of life, their good name, their families and their homes."[74] The CRC also provides in Article 13 that "Children have the right to get and to share information, as long as the information is not damaging to them *or to others.*"[75] These two articles seem to set up the Privacy versus Free Speech tension that off-campus internet expression imposes. Only a few cases seem to do so.

In *West Virginia State Board of Education v. Barnette,* a pre-*Tinker* case, the Supreme Court discussed the concept of the rights of school children in the context of a possible "collision" of rights that *Tinker* eventually forbids.[76] In this case, Barnette and others sought an injunction to restrain enforcing a regulation requiring children in public schools to salute the American flag, when Children of the Jehovah's Witness faith had "been expelled from school and . . . [were] threatened with exclusion for no other cause."[77] The Supreme Court found that the appellees' decision *not* to salute the flag or recite the pledge did "not bring them into collision with rights asserted by any other individual."[78] The Court reasoned that "the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do

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[70] *See* BOHL & LORILLARD, *supra* note 10, at ix.

[71] S. Randall Humm et al., *Introduction* to CHILD, PARENT, AND STATE: LAW AND POLICY READER at xv (1994).

[72] Michael Freeman, *Introduction* to CHILDREN'S RIGHTS: A COMPARATIVE PERSPECTIVE 1 (Michael Freeman ed., 1996).

[73] Susan Kilbourne, *The Convention on the Rights of the Child: Federalism Issues for the United States*, 5 GEO. J. ON FIGHTING POVERTY 327, 329 (1998).

[74] U.K. COMM. FOR UNICEF, CHILDREN'S RIGHTS AND RESPONSIBILITIES (1991), *available at* http://www.unicef.org/rightsite/files/rights_leaflet.pdf.

[75] *Id.* (emphasis added).

[76] 319 U.S. 624, 630 (1943).

[77] *Id.*

[78] *Id.* at 630.

so . . . . The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude."[79]

In a passage recalling Brandeis' paean to the right of privacy in his *Olmstead* dissent,[80] the Court found that "the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[81] In a concurring opinion, Justice Murphy reasoned that the benefits to society from the compulsory flag salute were not "sufficiently definite and tangible to justify the invasion of freedom and privacy that it entailed or to compensate for a restraint on the freedom of the individual to be vocal or silent according to his conscience or personal inclination."[82]

In another pre-*Tinker* case, the Fifth Circuit applied *Barnette* and foreshadowed *Tinker*[83] in a discussion of behavior at school that caused "a collision with the rights of others."[84] In *Blackwell v. Issaquena County Board of Education*, thirty students at "the all-Negro" Henry Weathers High School wore "freedom buttons to class."[85] The small "buttons depict[ed] a black and white hand joined together with 'SNCC' [Student Nonviolent Coordinating Committee] inscribed in the margin."[86] According to school officials, some of the students created a disturbance in the hallways when they were scheduled to be in class.[87] Three students were brought to the principal's office and told that no one

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[79] *Id.* at 630-31.

[80] Brandeis wrote of the Constitution's recognition of the "significance of man's spiritual nature, of his feelings and of his intellect." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[81] *Barnette*, 319 U.S. at 642.

[82] *Id.* at 646. (Murphy, J., concurring).

[83] *Tinker* held that a student's First Amendment right of free speech was not protected if the speech created a substantial disruption or caused a "collision with the rights of other students." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

[84] Blackwell v. Issaquena Cnty. Bd. of Educ., 363 F.2d 749, 754 (5th Cir. 1966).

[85] *Id.* at 750.

[86] *Id.*

[87] *Id.* at 751.

could be permitted to create a disturbance and that they would have to remove their buttons.[88]

The following Monday, approximately 150 students came to school wearing the buttons.[89] These students distributed buttons in the corridor of the school building and accosted other students by pinning the buttons on them, causing a younger student to cry.[90] This activity disrupted class instruction and resulted in a general breakdown of orderly discipline.[91] After the principal assembled the students in the cafeteria and informed them that they were forbidden to wear the buttons at school, the students became hostile and discourteous.[92]

The next day, close to 200 students appeared wearing buttons and were told that if they returned to school again wearing buttons they would be suspended.[93] The following day, the students returned to school wearing the buttons and the principal immediately sent them home.[94] As the students gathered their books to go home, some invaded classes, ignoring the teachers, and invited others to join them.[95]

Parents of the suspended children met with the superintendent and the principal, but no agreement was ever reached.[96] Those children who continued to remain at home after a period of twenty days were suspended for the balance of the school year.[97]

A mandatory preliminary injunction was sought to compel school officials to re-admit the suspended pupils and to allow them to wear freedom buttons so long as no disturbance resulted, but the injunction was denied.[98] On appeal, the Fifth Circuit considered whether the school regulation forbidding the wearing of freedom buttons was a "reasonable rule necessary for the

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[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* at 751-52.
[96] *Id.* at 752.
[97] *Id.*
[98] *Id.*

maintenance of school discipline or an unreasonable rule which infringes on the students' right to freedom of speech guaranteed by the First Amendment of the United States Constitution."[99]

The court began by noting that it was within the province of school authorities to prohibit and punish acts calculated to undermine the school routine, which it stated was "not only proper . . . but . . . necessary."[100] The court characterized the case as one that involved "regulations limiting freedom of expression and the communication of an idea which are protected by the First Amendment," and presented "serious constitutional questions," which demanded keeping in mind the fundamental constitutional rights of those being affected.[101]

The court found that the Constitution "does not confer 'unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom.'"[102] However, it opined that the interests the regulation sought to protect must be "fundamental and substantial if there is to be a restriction of speech."[103]

The court contrasted *Barnette*, in which the Supreme Court was careful to note that the students' refusal to participate in the salute and pledge "did not interfere with or deny rights of others to do so and the behavior involved was 'peaceable and orderly.'"[104] In *Blackwell*, the Fifth Circuit found there was "an unusual degree of commotion, boisterous conduct, a collision with the rights of others, an undermining of authority, and a lack of order, discipline and decorum."[105] Reasoning that the "proper operation of public school systems is one of the highest and most fundamental responsibilities of the state," yet warning that

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[99] *Id.*

[100] *Id.* at 753.

[101] *Id.*

[102] *Id.* at 754 (citation omitted).

[103] *Id.* Of interest here is Judge Kozinski's characterization of "the 'rights of others' language in *Tinker*" as referring only to "traditional rights, such as those against assault, defamation, invasion of privacy, extortion and blackmail, whose interplay with the First Amendment is well established." Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1198 (9th Cir. 2006) (Kozinski, J., dissenting) (emphasis added).

[104] *Blackwell*, 363 F.2d at 754 (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 631 (1943)).

[105] *Id.*

"school officials should be careful in their monitoring of student expression in circumstances in which such expression does not substantially interfere with the operation of the school," the court upheld the district court's denial of the injunction based on the "abundance of clear, convincing and unequivocal testimony" in the case.[106] As such, this decision, handed down three years before *Tinker*, seemed to anticipate and apply both its tests—the court found *both* a substantial disruption *and* a collision with the rights of others—presumably their privacy right to be left alone.

B. The First Amendment Right of Free Speech for School Students

The parameters of the right of free speech guaranteed to students emerged three years later in *Tinker v. Des Moines Independent Community School District*.[107] In *Tinker*, three students wore black armbands to school to protest the Vietnam War.[108] The school responded by adopting a policy forbidding such armbands and asked the students to remove them.[109] The students refused and were suspended.[110] The district court refused to grant the students' request for an injunction restraining school officials from disciplining them.[111] The Eighth Circuit upheld the order, but the Supreme Court reversed.[112]

Citing *Barnette*, the Court found that wearing the armbands to express political views was protected by the First Amendment and was in no way "actually or potentially disruptive conduct . . . ." but was "closely akin to 'pure speech' which . . . is entitled to comprehensive protection under the First Amendment."[113]

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[106] *Id. But see* Burnside v. Byars, 363 F.2d 744, 746-49 (1966). *Burnside* was decided simultaneously by the Fifth Circuit, and held that a high school regulation prohibiting students from wearing "freedom buttons," which had the words "One Man One Vote" and "SNCC" and which did *not* appear to hamper the school in carrying out its regular schedule of activities, was arbitrary and unreasonable, and an unnecessary infringement on students' protected right of free expression. *Id.*

[107] 393 U.S. 503 (1969).

[108] *Id.* at 504.

[109] *Id.*

[110] *Id.*

[111] *Id.* at 504-05.

[112] *Id.* at 505.

[113] *Id.*

Recognizing that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[114] the Court found that "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."[115]

Citing both *Blackwell v. Issaquena County Board of Education* and *Burnside v. Byars*, the Court reasoned that a student may express opinions at school as long as they do not:

> [M]aterially and substantially interfer[e] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others. But conduct by the student, in class or out of it, which for any reason-whether it stems from time, place, or type of behavior-materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.[116]

Because the Court found nothing in the record that might have led school officials to forecast "substantial disruption of or material interference with school activities," the Court reversed.[117]

The *Tinker* Court therefore set out two exceptions to on-campus expression otherwise protected by the First Amendment. Such expression will not be protected if it causes, or foreseeably will cause, a substantial disruption of school activities (the test applied in *Tinker* itself), or if it collides with the rights of others. Although the two exceptions carved out by the Court were clearly written to be disjunctive,[118] lower courts have seldom applied the

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[114] *Id.* at 506.

[115] *Id.* at 511.

[116] *Id.* at 513 (citing Blackwell v. Issaquena Cnty. Bd. of Educ., 363 F.2d 749, 749 (5th Cir. 1966); *Burnside*, 363 F.2d at 749).

[117] *Id.* at 514.

[118] McCarthy, *supra* note 22, at 7 (citing *Harper v. Poway Unified School District*, 445 F.3d 1166 (2006), *vacated* 549 U.S. 1262 (2007), as concluding that "both prongs of the *Tinker* principle stand alone"). The court in *Beverly Hills* similarly said that the collision with the rights of others test exists "[i]n addition to the substantial disruption test." J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1122 (2010).

second prong alone.[119] The district court in *Beverly Hills* declined to do so because the "precise scope" of *Tinker*'s "rights of others" language was unclear.[120] However, by referring specifically to *Barnette*, *Blackwell*, and *Burnside* as the source of the "collision with the rights of others" test, the Court was certainly thinking of a collision with the *privacy* rights of another student or teacher, as outlined in those cases.[121]

The Supreme Court was to create three more exceptions to on-campus protected expression after those specified in *Tinker* itself. In *Bethel School District No. 403 v. Fraser*, the Court held that a school district acted within its permissible authority in imposing sanctions upon a student in response to his "offensively lewd and indecent speech" given during a school assembly of nearly 600 students.[122] The speech was "an elaborate, graphic . . . sexual metaphor," for which the student was suspended.[123] The record showed that "students appeared to be bewildered and embarrassed by the speech," and one teacher had "to forgo a portion of the scheduled class lesson in order to discuss the speech with the class."[124]

The Court reasoned that unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were not for political speech.[125] The Court found:

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[119] The court in *Nixon v. Northern Local School District*, 383 F. Supp. 2d 965 (2005), was urged to do so, but declined because of lack of precedent. *See* McCarthy, *supra* note 22, at 6-7. However, a year later, the Ninth Circuit, in *Harper v. Poway Unified School District*, applied *Tinker*'s second test and concluded that a student wearing a T-shirt to school proclaiming "HOMOSEXUALITY IS SHAMEFUL," had violated the rights of others, forfeiting any constitutional protection of that expression. 445 F.3d at 1178.

[120] *Beverly Hills*, 711 F. Supp. 2d at 1122. The court declined to "extend[] the *Tinker* rights of others prong so far as to hold that a school may regulate any speech that may cause some emotional harm to a student." *Id.* at 1123; *accord* Bowlet v. Town of Hudson, 514 F. Supp. 2d 168, 176 (finding the precise scope of *Tinker*'s "rights of others" language "unclear"); *see also* Bonnie A. Kellman, *Tinkering with* Tinker: *Protecting the First Amendment in Public Schools*, 85 NOTRE DAME L. REV. 367, 368 (2009) ("Neither *Tinker* nor any other Supreme Court case [gives] lower courts any real guidance about exactly when certain speech 'colli[des] with the rights of other students to be secure and to be let alone.'").

[121] *See supra* notes 76-105 and accompanying text.

[122] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

[123] *Id.* at 678.

[124] *Id.*

[125] *Id.* at 685.

> The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech . . . would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students . . . . [V]ulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education.[126]

Justice Brennan concurred, explaining that if Fraser had given the same speech off campus he could not have been penalized "simply because government officials considered his language to be inappropriate."[127] However, students may properly be reprimanded for expression that school officials conclude disrupted the school's educational mission.[128] Ultimately, the Court found that the "determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."[129]

Many courts have read *Fraser* as merely allowing schools to prohibit "the 'manner' of speech that is offensive, not the viewpoint expressed."[130] In this context, Justice Brennan's observation would seem to indicate that the *content* of the speech was protected, but the type of speech—that is, lewd, vulgar, and offensive speech intentionally presented on campus—was not. *Fraser* thus seems to limit its holding to "offensive form[s] of expression" and "vulgar and offensive terms" specifically delivered

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[126] *Id.* at 685-86.

[127] *Id.* at 688 (Brennan, J., concurring).

[128] *Id.*

[129] *Id.* at 683.

[130] Cindy Lavorato & John Saunders, *Public High School Students, T-Shirts and Free Speech: Untangling the Knots*, 209 EDUC. L. REP. 1, 14 (July 2006) (surveying court interpretations of *Fraser*). In *Morse v. Frederick*, the Supreme Court itself admitted that "[t]he mode of analysis employed in *Fraser* is not entirely clear. The Court was plainly attuned to the content of Fraser's speech . . . . But the Court also reasoned that school boards have the authority to determine 'what manner of speech in the classroom or in the school assembly is inappropriate.'" 551 U.S. 393, 404 (2007) (quoting *Fraser*, 478 U.S. at 683). The Court did not attempt to "resolve the debate," in *Morse*. *Id.*; *see also* Joanna Nairn, *Free Speech 4 Students:* Morse v. Frederick *and the Inculcation of Values in Schools*, 43 HARV. C.R.-C.L. L. REV. 239, 241 (2008).

on campus.[131] Perhaps for these reasons, only one court has been willing to extend *Fraser* to expression with its inception off campus, even if that expression subsequently makes its way onto campus and causes equivalent or even greater embarrassment.[132]

However, *Fraser* steps back from *Tinker* in that the Court did not require a "substantial disruption" within the school to bring the speech outside constitutional protection.[133] The Court, without so stating, recognized that school children have a right not to be held captive to speech that "bewilder[s] and embarrass[es]" them.[134] In so doing, as Renee Servance points out, "the Court recognized the necessity of balancing the right to free speech with the goal of protecting the rights of others where speech causes harm. In sum, *Fraser* protected the rights of others."[135] For these reasons, *Fraser* has often been thought to be the closest match for cyber-bullying cases.[136]

The next exception to on-campus protected expression came in *Hazelwood School District v. Kuhlmeier*, in which the Court upheld the right of a principal to remove two articles from the

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[131] *Fraser*, 478 U.S. at 683.

[132] In *J.S. v. Bethlehem Area School District*, the court found that there was a "sufficient nexus" between a website created by a student off campus that made vulgar, profane, and threatening comments about a particular teacher and the school campus to consider the speech as occurring on campus. 807 A.2d 847, 865 (Pa. 2002). Once that "threshold question" had been answered in the affirmative, the court found that the case before it "straddled" the political speech in *Tinker*, and the lewd and plainly offensive speech in *Fraser*. *Id.* at 866. The court then applied first Fraser and then *Tinker*'s substantial disruption test, and found both satisfied. *Id.* at 868-69. The district court in *J.S. ex rel. Snyder v. Blue Mountain School District*, applied *Fraser* and held that the off-campus expression could be restricted "because the lewd and vulgar off-campus speech had an effect on campus." 2008 WL 4279517, at *7. However, the Third Circuit declined to decide whether *Fraser* could be applied to such off-campus speech. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286 (3d Cir. 2010). *But see* Bowler v. Town of Hudson, 514 F. Supp. 2d 168 (D. Mass. 2007) (refusing to apply *Fraser* to speech that did not make it way onto campus); Doninger v. Niehoff, 527 F.3d 41, 49 (2d Cir. 2008) ("It is not clear, however, that *Fraser* applies to off-campus speech.").

[133] The Court in *Morse v. Frederick* found that the holding in *Fraser* was not based on any showing of substantial disruption, and therefore stated that the "mode of analysis" set forth in *Tinker* was "not absolute." 551 U.S. 393, 405 (2007).

[134] *Fraser*, 478 U.S. at 678.

[135] Servance, *supra* note 7, at 1229.

[136] *Bethlehem*, 807 A.2d at 868 (finding that if the court were to solely apply *Fraser*, it would have "little difficulty in upholding the School District's discipline").

school's newspaper about teen pregnancy and divorce.[137] The Court found that the issue before it was different from that in *Tinker*, which considered whether the First Amendment requires a school to *tolerate* particular student speech.[138] The question before the Court in *Hazelwood* was whether the First Amendment requires a school affirmatively to *promote* particular student speech, such that it would bear the "imprimatur of the school."[139]

The Court found that educators are entitled to exercise greater control over school-sponsored student expression "to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school."[140] The Court therefore held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[141] However, because *Hazelwood* particularly limited its decision to expression not merely tolerated but promoted through school-sponsored media, the decision has had little application to off-campus cyber-bullying cases.[142]

In its most recent decision, and one many hoped would revisit *Tinker* in light of the computer age,[143] the Court considered the reach of the schoolhouse gates within which student expression

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[137] 484 U.S. 260 (1988).

[138] *Id.* at 270-71.

[139] *Id.*

[140] *Id.*

[141] *Id.* at 273.

[142] *See generally* King, *supra* note 11, at 868.

[143] *See* Martha McCarthy, *Student Expression Rights: Is a New Standard in the Horizon?*, 216 EDUC. L. REP. 15, 15 (2007) ("[T]he *Frederick* decision provides a vehicle for the Court to reinforce or alter the legal principles governing public school students' free expression rights."). McCarthy and others had for some time felt that "clarification is needed as to when student expression has to be disruptive to be censored and whether expression that conflicts with the school's mission can be curtailed in the absence of a threat of disruption." *Id.* at 30. To that end, there was some hope of a "broad interpretation of the limitations imposed by *Fraser*," extending it to off-campus speech. *Id.*

was protected unless it provoked a "substantial disruption" or collided with "the rights of others."[144] In *Morse v. Frederick*, the Court considered the case of Joseph Frederick who, along with fellow students, attended the Olympic Torch Relay that passed along a public street in front of the school.[145] The principal allowed students to leave class to attend the relay; Frederick was apparently late that day, however, and went directly to join his friends on the street in front of the school.[146] While waiting for the torch to arrive, he unfurled a fourteen-foot banner that read, "BONG HiTS 4 JESUS," apparently to attract television attention.[147] The banner was clearly visible to students across the street.[148] The school principal asked Frederick to take the banner down, he refused, and she confiscated the banner and suspended Frederick.[149]

Because the incident occurred on a public street, and at a time when classes were not in session, Frederick argued that this was not a school speech case.[150] Echoing lower court decisions that asked for clear definition of students' First Amendment rights for off-campus speech,[151] the Court admitted that "[t]here is some uncertainty at the outer boundaries as to when courts should

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[144] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

[145] Morse v. Frederick, 551 U.S. 393, 397 (2007).

[146] *Id.*

[147] *Id.*

[148] *Id.* at 397.

[149] *Id.*

[150] *Id.* at 400.

[151] *See, e.g.*, J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002). The court in *Bethlehem* stated:

> Unfortunately, the United States Supreme Court has not revisited this area for fifteen years. Thus, the breadth and contour of these cases and their application to differing circumstances continues to evolve. Moreover, the advent of the Internet has complicated analysis of restrictions on speech . . . . Indeed, *Tinker*'s simple armband, worn silently and brought into a Des Moines, Iowa classroom, has been replaced by J.S.'s complex multi-media web site, accessible to fellow students, teachers, and the world.

Id. at 863-64. Because of this, the Court determined that although "lower courts, in the context of internet communication, have focused on *Tinker* . . . we are not convinced that reliance solely on *Tinker* is appropriate." Thus, the court applied both *Fraser* and *Tinker* to the case and found both standards satisfied. *Id.* at 867.

apply school speech precedents."[152] Nevertheless, the Court treated Frederick's expression, which was decidedly off campus in both its inception and display, as on-campus speech because its creator brought the banner to a school-sponsored event and displayed it in front of other members of the school community during regular school hours.[153] In perhaps the first Supreme Court opinion to enclose geographically off-campus expression within the schoolhouse gates, the Court reasoned that, "Frederick cannot stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school."[154]

Once it determined that the expression was on-campus speech, the Court neither applied *Tinker*'s "substantial disruption" test, nor reviewed and revised it, as some had guessed was the Court's reason for granting certiorari.[155] The Court simply stated that the *Tinker* standard was "not absolute."[156] Nor, as the Court admitted, did it apply *Hazelwood*, because it found no basis for concluding that the banner bore the "school's imprimatur."[157] The Court also refused to apply *Fraser*, which it found "should not be read to encompass any speech that could fit under some definition of 'offensive.'"[158] The Court determined that the concern was "not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use."[159] The Court looked to the "special characteristics of the school environment,"[160] and the

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[152] *Morse*, 551 U.S. at 401.

[153] *Id.* The *Wisniewski* court summarized the finding in *Morse*:

> Since the Supreme Court in *Morse* rejected the claim that the student's location, standing across the street from the school at a school approved event with a banner visible to most students, was not 'at school,' it had no occasion to consider the circumstances under which school authorities may discipline students for off-campus activities.

Wisniewski v. Bd. of Educ., 494 F.3d 34, 39 n.3 (2d Cir. 2007) (citation omitted).

[154] *Morse*, 551 U.S. at 401 (internal quotation marks omitted).

[155] McCarthy, *supra* note 22, at 15.

[156] *Morse*, 551 U.S. at 405.

[157] *Id.*

[158] *Id.* at 409.

[159] *Id.*

[160] *Id.* at 408 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

"governmental interest in stopping student drug abuse,"[161] in finding that "[t]he First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers."[162]

In its factually narrow holding, the Court used, arguably for the first time, what has been called "content-based regulation," which targets a particular viewpoint as undeserving of First Amendment protection.[163] The Court held that "a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."[164]

The Court was highly divided, however, containing four separate opinions. The three dissenting Justices agreed that the principal should not be held liable for confiscating the banner, but found:

> [T]he school's interest in protecting its students from exposure to speech reasonably regarded as promoting illegal drug use, cannot justify disciplining Frederick for his attempt to make an ambiguous statement to a television audience simply because it contained an oblique reference to drugs. The First Amendment demands more, indeed, much more.[165]

In other words, the dissenters did not dispute the majority's content-based regulation of student speech but questioned whether the banner actually *was* promoting drug use.

The Court, therefore, clearly permitted content-based regulation in limited circumstances.[166] However, from its first student speech decision in *Tinker*, the Court has expressed fears that schools might become "enclaves of totalitarianism"[167] or

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[161] *Id.*

[162] *Id.* at 410.

[163] *See* Nairn, *supra* note 130, at 247.

[164] *Morse*, 551 U.S. at 403.

[165] *Id.* at 434 (Stevens, J., dissenting) (internal quotation marks omitted).

[166] The decision in *Morse* has been called a "significant philosophical departure" for the Court. Nairn, *supra* note 130, at 246. It signals "acceptance of a more inculcative approach to education and will likely extend beyond the intended context of non-political, pro-drug messages." *Id.*

[167] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

perpetrate "an official suppression of ideas," and even *Fraser* demonstrates the Court's reluctance to allow too much content-based regulation of speech in schools.[168]

II. THE INTERNET-EXPRESSION CASES: STUDENTS TARGETING SCHOOL ADMINISTRATORS AND TEACHERS

As shown above, the Supreme Court's quartet of student speech cases provide no clear method for determining students' First Amendment rights for speech originating off campus via the Internet but eventually coming onto campus. As a result, lower courts often grapple with which standard to apply. When analyzing student expression under *Tinker*'s substantial disruption test, the courts frequently engage in a highly fact-specific analysis of exactly what a "substantial disruption" looks like. This has resulted in opinions so divergent that in April of 2010, the Third Circuit vacated two of its opinions, handed down just two months earlier, by two different panels of judges, because of seemingly contradictory decisions on remarkably similar facts.[169]

Interestingly, in the pure internet-expression cases (as opposed to forms of other student expression originating off campus and making its way on campus, or anti-harassment policy cases), the earliest opinions upheld the First Amendment rights of the student under *Tinker* without considering the fact that the expression originated off campus.[170] In 1998, in *Beussink v. Woodland R-IV School District*, Brandon Beussink created a homepage on his personal computer at home and posted it on the

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[168] Nairn, *supra* note 130, at 246 (quoting Bd. of Educ. v. Pico, 457 U.S. 853, 871 (1982)).

[169] *Compare* Layshock v. Hermitage Sch. Dist., 593 F.3d 249 (3d Cir. 2010), *with* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286 (3d Cir. 2010). Even at the district court level, Martha McCarthy observed that, "It is somewhat difficult to reconcile the outcome in [*Layshock*] and the more recent reasoning in *J.S. v. Blue Mountain* . . . ." McCarthy, *supra* note 22, at 13. The en banc rehearing occurred June, 3, 2010. As this Article went into production, the Third Circuit issued opinions upholding the students' First Amendment challenges in both cases. Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (en banc); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (en banc); *see also infra* note 373.

[170] I treat the cases in order of the final judgments on appeal to the federal circuit court or state high court.

Internet.[171] Brandon's website was highly critical of his school's administration, contained crude and vulgar language conveying his opinions of the teachers, and provided a link to the school's website, through which he invited readers to contact the school and communicate their opinions.[172] Brandon testified that he did not intend for his website to be viewed at school—he just wanted to voice his opinion.[173] However, when he allowed a friend to use his home computer, she inadvertently, and without Brandon's authorization or knowledge, discovered his website.[174] When that friend later became angry with Brandon, she accessed the homepage during school hours and showed it to her computer teacher; there was no evidence that any other student saw the page, and there was no further disturbance at that time, although during the day, many other students viewed the homepage.[175] Brandon was suspended immediately upon the principal learning of the website.[176]

The district court applied *Tinker*'s substantial disruption standard and found that Brandon's suspension violated his First Amendment rights.[177] The court reasoned that a school official must be able to show more than a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[178] Even allowing that under *Tinker* the fear of disruption could render Brandon's expression unprotected, the court stated that the fear must be reasonable and not an "undifferentiated fear" of disturbance.[179] The court found that the principal's decision to suspend Brandon *immediately* upon learning of the incident indicated that he disciplined Brandon because he was "upset" by the content and not because he feared a disruption.[180] In sum, the court stated that "[d]isliking or being

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171 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998).

172 *Id.* The court found it important that the link worked both ways; Brandon's homepage could also be accessed from the school's homepage. *Id.* at 1177 n.1.

173 *Id.*

174 *Id.* at 1178.

175 *Id.* at 1178-79.

176 *Id.* at 1179.

177 *Id.* at 1180.

178 *Id.*

179 *Id.*

180 *Id.*

upset by the content of a student's speech is not an acceptable justification for limiting student speech under *Tinker*."[181]

Two years later, in *Emmett v. Kent School District*, a district court again applied *Tinker*'s substantial disruption standard to uphold a student's First Amendment rights.[182] In this case, Nick Emmett posted a website on the Internet from home that contained commentary about the school's faculty and administration, along with a "warning" that the site was not school-sponsored and was for entertainment only.[183] The website contained mock obituaries of several of Emmett's friends, written tongue-in-cheek and apparently inspired by a creative writing assignment to create one's own obituary.[184] The obituaries became a topic of discussion at school, and Emmett eventually allowed visitors to the website to vote on who would "die" next—that is, be the subject of the next obituary.[185] However, a few days later an evening television news story reported that Emmett had created a "hit list," causing Emmett to remove the site.[186] He was subsequently suspended.[187]

The district court found both *Fraser* and *Hazelwood* inapplicable as the case did not involve speech at a school assembly or school-sponsored speech, and thus applied *Tinker*'s substantial disruption standard.[188] As in *Beussink*, the court found that the expression could not be based on "undifferentiated fears of disturbances or embarrassment to school officials."[189] Since the expression was in no way connected with school classes or projects, and neither threatened nor intimidated anyone, nor ever intended to do so, the court found the speech "entirely outside the school's supervision or control."[190]

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[181] *Id.*
[182] 92 F. Supp. 2d 1088 (W.D. Wash. 2000).
[183] *Id.* at 1089.
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.* at 1090.
[189] *Id.*
[190] *Id.*

A year later, in *Killion v. Franklin Regional School District*, yet another district court upheld a student's First Amendment rights.[191] The student, Zachariah Paul, compiled on his home computer a lewd and vulgar "Top Ten" list about the school's athletic director's personal appearance, which he emailed to friends but did not otherwise bring to school because he had been disciplined for doing so with similar lists in the past.[192] However, another student later copied the list and brought it to school, where it was found in the teachers' lounge.[193] Paul was subsequently suspended for "verbal/written abuse of a staff member."[194]

The student, through his mother, Joanne Killion, filed a motion for summary judgment alleging that the school had no authority over off-campus speech.[195] The school also filed for summary judgment, alleging that the speech was lewd and offensive and, because distributed on campus, had the potential of causing substantial disruption,[196] essentially invoking both *Fraser* and *Tinker*. After considering the (then) three Supreme Court cases, and recognizing that there was "limited case law" on the issue,[197] the court refused to apply *Fraser* to expression having its inception off campus, quoting Justice Brennan's reasoning that "if . . . [the student] had given the same speech outside the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate."[198] The court therefore applied *Tinker*'s substantial disruption test and found that the speech was not threatening and

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[191] 136 F. Supp. 2d 446 (W.D. Pa. 2001).

[192] *Id.* at 448.

[193] *Id.* at 448-49.

[194] *Id.* at 449.

[195] *Id.* at 450.

[196] *Id.*

[197] *Id.* at 454. The court considered *Beussink*, *Emmett*, and the lower court opinion in *J.S. v. Bethlehem Area School District*, 757 A.2d 412 (Pa. Commw. Ct. 2000). *See also infra* notes 210-32 and accompanying text (discussing the 2002 Pennsylvania Supreme Court case affirming the lower court's decision).

[198] *Id.* at 456 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 688 (1986) (Brennan, J., concurring)). It is interesting to wonder what the *Killion* court might have made of *Morse*. There the banner was clearly created off campus and unfurled in a public street, but still deemed on-campus speech.

there was no evidence of actual disruption since the list was on school grounds for several days before the administration became aware of it and at least a week before they took action.[199] The court cited *Beussink* and reiterated that "[d]isliking or being upset by the content" of student speech is not sufficient to limit it under *Tinker*.[200]

In 2002, the federal district courts continued the string of decisions upholding a student's First Amendment rights in *Mahaffey v. Aldrich*.[201] In this case, Joshua Mahaffey contributed to a website created by another student entitled "Satan's web page."[202] The students alleged that they created and contributed to the site because they were bored and wanted something to do.[203] The site, among other things, listed "people I wish would die," "people that are cool," and near the bottom, "SATAN'S MISSION FOR YOU THIS WEEK," asking readers to "stab someone . . . throw them off a cliff . . ." then stating, "Killing people is wrong . . . don't do it unless I'm there to watch," then, "PS: NOW THAT YOU'VE READ MY WEB PAGE PLEASE DON'T GO KILLING PEOPLE AND STUFF AND BLAMING IT ON ME. OK?"[204] Another student's parent notified the police about the website, who notified the school, who then suspended Mahaffey.[205]

In considering the competing motions for summary judgment filed by the student and the school, the court rejected the school's contention that the expression on the website constituted a true threat, and as such was not protected by the First Amendment.[206] The court reasoned that because Mahaffey had stated that the

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[199] *Id.* at 455.

[200] *Id.* (quoting Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998)).

[201] 236 F. Supp. 2d 779 (E.D. Mich. 2002). *Mahaffey* was actually decided two months after the Pennsylvania Supreme Court decided *J.S. v. Bethlehem Area School District*, but since the court apparently had not read the decision, referring only to the lower court decision in *Bethlehem*, I will treat *Mahaffey* first in order to highlight the string of federal district court cases upholding students' First Amendment rights.

[202] *Id.* at 781.

[203] *Id.*

[204] *Id.* at 782 (typographical errors in original eliminated).

[205] *Id.*

[206] *Id.* at 785-86.

website was created "for laughs," he had not intended others to see it and never communicated it to them, and in fact, made no specific threat against any individual or group, no "reasonable person" would construe the statements on the webpage as a true threat.[207] Thus, the court applied *Tinker*, and distinguished the appellate level decision in *J.S. v. Bethlehem Area School District*[208] on the fact that there was no evidence of disruption in the case before it, without further discussion.[209]

It was not until September of 2002, in *J.S. v. Bethlehem Area School District*, that the Supreme Court of Pennsylvania became the first court to render a final decision finding student internet expression occurring off campus to lack First Amendment protection.[210] In *Bethlehem*, the student, J.S., created a website on his home computer and posted it on the Internet.[211] The website, entitled "Teacher Sux," consisted of several pages of "derogatory, profane, offensive and threatening" comments, pictures, animation, and sound clips, primarily about his algebra teacher.[212]

The most striking page was captioned "Why Should She Die," and solicited $20 from readers to help pay for a "hitman."[213] "Ultimately students, faculty and administrators of the [s]chool . . . [saw] the website after J.S. told other students about the site and even showed it to another student at school."[214] The principal took the threats seriously, and informed the algebra teacher.[215] She was frightened and suffered stress, anxiety, loss of appetite and weight, short-term memory loss, headaches, and an inability to go out of the house, resulting in her being unable to return to

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[207] *Id.* at 786. Mahaffey claimed that he created the website just "for laughs" and had not intended for others to see it. *Id.* The court's decision was also influenced by the fact that Mahaffey's website made no specific threat against any individual or group. *Id.*

[208] J.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412 (Pa. Commw. Ct. 2000).

[209] *Mahaffey*, 236 F. Supp. 2d at 785. The Pennsylvania Supreme Court later affirmed the commonwealth court's decision.

[210] 807 A.2d 847, 869 (Pa. 2002).

[211] *Id.* at 850.

[212] *Id.* at 851.

[213] *Id.*

[214] *Id.* at 851-52.

[215] *Id.* at 852.

school to finish out the year.[216] The school was forced to hire three substitute teachers to replace her, the morale of the students was at an all-time low, and a counselor compared it to "the death of a student or staff member."[217]

The school took no action against J.S. until the end of the year, where at that time they suspended and voted to expel J.S., whose parents had by then enrolled him at an out-of-state school for the next year.[218] Both the Court of Common Pleas and the Commonwealth Court upheld the expulsion.[219] J.S. appealed to the Supreme Court of Pennsylvania, who granted allocator to "review the issue of whether the Commonwealth Court erred in its conclusion that the School District did not violate J.S.'s First Amendment rights by punishing him for the posting of the 'Teacher Sux' web site."[220]

After an extensive discussion of First Amendment jurisprudence, the court first determined that the website expression contained no true threat, although it was viewed as one by the teacher and initially treated as one by the school.[221] Looking at the overall circumstances, the court reasoned that the website was "a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody . . . [and] it did not reflect a serious expression of intent to inflict harm."[222] The court reasoned that because the website focused primarily on the teacher's "physique and disposition" and used cartoon characters, hand drawings, song, and a comparison to Adolph Hitler, and because the school continued to allow J.S. to attend class and extracurricular activities and had only commenced discipline well after the conclusion of the school year, the school's position that the website contained a true threat was severely undermined.[223]

The court then considered the website in light of the Supreme Court's First Amendment exceptions for otherwise protected

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[216] *Id.*
[217] *Id.*
[218] *Id.* at 852-853.
[219] *Id.* at 853.
[220] *Id.*
[221] *Id.* at 859-60.
[222] *Id.* at 859.
[223] *Id.* at 859-60.

student speech. In order to do so, however, the court addressed as a "threshold issue" the location of the speech, because J.S. argued that it was purely off-campus speech not governed by any of the school speech cases.[224] The court determined that there was a "sufficient nexus" between the off-campus expression and the school to consider the speech as occurring on campus because J.S. accessed the site at school, on a school computer, and showed it to another student.[225]

The court recognized that, although the few courts that had considered internet communication had focused on *Tinker* in their analysis (citing *Beussink*, *Emmett*, and *Killion*), the expression before it "straddle[d] the political speech in *Tinker*, and the lewd and offensive speech expressed at an official school assembly in *Fraser*."[226] Recognizing that the Supreme Court had "not revisited this area for fifteen years," the court noted that "the breadth and contour of these cases and their application to differing circumstances continues to evolve," and that "the advent of the Internet has complicated analysis of restrictions on speech. Indeed, *Tinker*'s simple armband, worn silently and brought into a Des Moines, Iowa classroom, has been replaced by J.S.'s complex multi-media web site, accessible to fellow students, teachers, and the world."[227]

Because of this, the court was not convinced that reliance on *Tinker* alone was appropriate, although it had been the path taken by earlier internet cases.[228] The court stated that it did not need to determine whether the facts called for application of *Fraser*, to be "governed by the lewd and plainly offensive speech analysis," or *Tinker*, and thus "subject to review for substantial disruption of the work of the school," because "application of either case results in a determination in favor of the School District."[229] The court found that punishing the use of lewd, vulgar, and plainly offensive expression "fits easily within *Fraser*'s upholding of discipline for

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[224] *Id.* at 864.
[225] *Id.* at 865.
[226] *Id.* at 866-67.
[227] *Id.* at 863-64.
[228] *Id.* at 867.
[229] *Id.*

speech that undermines the basic function of a public school . . . . [W]ere we to solely apply *Fraser*, we would have little difficulty in upholding the School District's discipline."[230] Additionally, the court found a substantial disruption of the work of the school as shown by the teacher's physical and emotional injuries, the need to hire substitute teachers, and the low morale throughout the school, comparable to a death.[231]

Bethlehem's dual analysis under *Fraser* and *Tinker* has not been repeated,[232] but its discussion of a "threshold issue" concerning the nexus of the expression and the school campus, and subsequent *Tinker* analysis, began a trend for courts to uphold school restriction and punishment of off-campus speech if brought onto campus and creating a substantial disruption. In 2007, the Second Circuit upheld a school's right to discipline a student in *Wisniewski v. Board of Education.*[233] In that case, Aaron Wisniewski created an Instant Messaging icon, from his parents' home computer, to identify himself in IM messages.[234] Aaron's icon was a small drawing of a pistol firing a bullet at a person's head, above which were dots representing splattered blood, and the words, "Kill Mr. VanderMolen," Aaron's English teacher.[235] Aaron sent the icon to several friends but not to Mr. VanderMolen.[236] Eventually, another student printed out the icon and gave it to Mr. VanderMolen, who was "distressed" and took it to the principal, who then notified the police and suspended Aaron.[237]

The court first refused to consider the icon as a true threat, finding "that school officials have significantly broader authority to sanction student speech than the [Supreme Court's true threat] standard allows."[238] The court instead found the *Tinker* standard applicable, but first followed the Pennsylvania Supreme Court's

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[230] *Id.* at 868.
[231] *Id.* at 869.
[232] *See supra* note 132.
[233] 494 F.3d 34 (2d Cir. 2007).
[234] *Id.* at 35.
[235] *Id.* at 36.
[236] *Id.*
[237] *Id.*
[238] *Id.* at 38.

lead and considered whether there must be a "nexus" between the icon and the school campus.[239] The court was "divided as to whether it must be shown that it was reasonably foreseeable that Aaron's IM icon would reach the school property or whether the undisputed fact that it did reach the school pretermits any inquiry as to this aspect of reasonable foreseeability."[240] They were in agreement, however, that the *content* of the expression made it "reasonably foreseeable that the IM icon would come to the attention of school authorities and the teacher whom the icon depicted being shot."[241] Therefore, the court applied *Tinker* and found the icon "crosse[d] the boundary of protected speech and constitute[d] student conduct that poses a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would 'materially and substantially disrupt the work and discipline of the school.'"[242]

A year later, the Second Circuit again upheld a school's right to punish off-campus student speech that had a sufficient nexus with the campus in *Doninger v. Niehoff*.[243] In *Doninger*, Avery Doninger sent an email to students and parents at her school and posted a message on her blog criticizing the school for cancelling the school's "Jamfest," and encouraging recipients to contact school administrators to complain.[244] The school administrators received an influx of telephone calls and emails, and continued to receive them after Avery posted another message on her blog calling the administrators "douchebags" and urging readers to continue to call to "piss [the administrators] off."[245] As a result of the controversy, the administrators were forced to miss, or arrived late to, several school activities over several days.[246] After eventually discovering her blog, the school determined that Avery

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[239] *Id.* at 38-39.

[240] *Id.* at 39.

[241] *Id.* The court reasoned that "[a]s in *Morse*, the student . . . was not disciplined for conduct that was merely 'offensive' . . . ." *Id.* at 40.

[242] *Id.* at 38-39 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)).

[243] 527 F.3d 41 (2d Cir. 2008).

[244] *Id.* at 44-45

[245] *Id.*

[246] *Id.* at 46.

should not be allowed to run for class secretary and did not allow her to accept the position when she won as a write-in candidate.[247]

The court found that had Avery's expression occurred in the classroom, it would have fallen within *Fraser*, but refused to apply *Fraser*, which it found did not apply to expression created off campus.[248] Therefore, the court applied *Tinker* and its rule from *Wisniewski* "that a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct 'would foreseeably create a risk of substantial disruption within the school environment,' at least when it was similarly foreseeable that the off-campus expression might also reach campus."[249] The court held, as it had in *Wisniewski*, that the posting foreseeably created a risk of substantial disruption.[250]

A few months later, in *O.Z. v. Board of Trustees*, the District Court for the Central District of California upheld the suspension and involuntary transfer of a student who created a slideshow, distributed on YouTube, which depicted the killing of her English teacher.[251] The teacher uncovered the video after performing a Google search for her name.[252] She was upset, became ill, could not sleep, and eventually informed the principal of the video, who suspended the student and sought to transfer her to another school.[253]

The court found *Tinker*'s substantial disruption standard applicable and likened the case to *Wisniewski*.[254] Although the student argued that the video was a joke and she had no intent to communicate it to her teacher, the court found that since the student *had* shared the video with her friend, and given the *content* of the video, it was reasonable to predict that it would make its way onto campus, as it eventually did.[255] Once on campus, the court found it "reasonable, given the violent language

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[247] *Id.*
[248] *Id.* at 49-50.
[249] *Id.* at 48 (quoting Wisniewski v. Bd. of Educ., 494 F.3d 34, 40 (2d Cir. 2007)).
[250] *Id.* at 53.
[251] No. 08-5671, 2008 WL 4396895, at *1 (C.D. Cal. Sept. 9, 2008).
[252] *Id.* at *1.
[253] *Id.*
[254] *Id.* at *2.
[255] *Id.* at *4.

and unusual photos depicted in the slide show, for school officials to forecast substantial disruption of school activities."[256] Therefore, the court did not consider whether the school could satisfy the more difficult true threat test.[257]

Although these four cases seemed to set a pattern and indicate a trend to use an expression's content to predict whether the expression would come to campus and cause or portend a substantial disruption, three decisions handed down in 2010 call that into question.[258] On February 4, 2010, two different three-member panels of the Third Circuit issued opinions in two cases,[259] upholding earlier district court rulings in *Layshock v. Hermitage School District*[260] and *J.S. ex rel. Snyder v. Blue Mountain School District.*[261] The lower courts in each of these two cases reached different holdings on substantially similar facts involving students who were disciplined for using an off-campus computer to create an internet parody profile of a school official. One significant difference in the district court opinions was that the court in *Layshock* refused to bring the case under *Fraser*, finding that the Supreme Court's exception to the general *Tinker* substantial disruption rule was limited to lewd, vulgar, or

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[256] *Id.* at *3.

[257] *Id.*

[258] The dissent in the en banc rehearing of *J.S. ex rel. Snyder v. Blue Mountain School District* agreed that the decision of the court "causes a split with the Second Circuit." 650 F.3d 915, 950 (3d Cir. 2011) (en banc) (Fisher, J., dissenting).

[259] Layshock v. Hermitage Sch. Dist., 593 F.3d 249 (3d Cir. 2010); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286 (3d Cir. 2010). On April 9, the Third Circuit vacated both decisions and granted rehearing en banc, which occurred June 3, 2010. Ostensibly, the court granted the rehearing to reconcile its holdings, and seemed to do so in the en banc opinions of June 13, 2011. *See* Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (en banc); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (en banc). The Third Circuit's en banc opinions occurred after this Article was submitted for publication, and thus are referenced, but not expanded upon here. *See infra* note 373. However, the district court in *J.C. ex rel. R.C. v. Beverly Hills Unified School District* amended its Nov. 16, 2009 opinion after these two cases were affirmed in February 2010, "solely to address these Third Circuit opinions . . . ." 711 F. Supp. 2d 1094, 1095 n.1 (C.D. Cal. 2010). Thus, I discuss them here as they informed the California district court's opinion.

[260] Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587 (W.D. Pa. 2007).

[261] J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., No. 3:07cv585, 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008).

offensive expression *on campus*.[262] The court then found no sufficient "nexus" between the speech and any disruption at school, and concluded that any disruption that might have occurred was "minimal."[263] The district court in *Blue Mountain*, on the other hand, while noting the similarity to the facts of *Layshock*,[264] determined that it had to look beyond *Tinker* for its answer,[265] and ultimately found that the expression was not protected because it was lewd and offensive speech like that in *Fraser* and promoted illegal actions as in *Morse*.[266] Thus, the court held that "as vulgar, lewd, and potentially illegal speech that had an effect on campus, we find that the school did not violate the plaintiff's rights in punishing her for it even though it arguably did not cause a substantial disruption of the school."[267]

In the Third Circuit's review of *Layshock*, a three-judge panel unanimously ruled that a Pennsylvania school district violated the free speech rights of a high school student who was disciplined for creating, off-campus, an online parody profile of the school's principal that he created off campus and posted to MySpace.[268] Justin Layshock used his grandmother's computer to copy and paste a picture of the principal from the school's website into the MySpace profile.[269] Justin then provided "bogus" answers to the website's questionnaire in which he mocked the principal's size.[270] Justin then shared the profile with other students by adding them as friends; most other students at Justin's high school heard about the profile through word-of-mouth.[271] Three other students

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[262] *Layshock*, 496 F. Supp. 2d at 599-600.

[263] *Id.* at 600. The court stated, among other things, that there was no nexus between Justin's expression and the alleged disruption because there were three other profiles available on MySpace at the same time. *Id.* The court also found that there was no evidence that the "buzz" on campus was caused by Justin's profile "as opposed to the reaction of the administrators." *Id.*

[264] *Blue Mountain*, 2008 WL 4279517, at *8.

[265] *Id.* at *4.

[266] *Id.* at *6.

[267] *Id.*

[268] Layshock v. Hermitage Sch. Dist., 593 F.3d 249, 252 (3d Cir. 2010).

[269] *Id.*

[270] *Id.*

[271] *Id.* at 253.

subsequently posted even more vulgar postings than Justin's additions to the website.[272]

When the principal eventually learned of the profiles he found them "degrading," "demeaning," "demoralizing," and "shocking," and although he was not afraid for his safety, he thought about pressing charges for harassment, defamation, or slander.[273] He asked the school administration to disable the first profile, but students found ways to access the profiles, and Justin actually used a classroom computer to access the profile and show it to others.[274] Justin ultimately admitted to creating the profile, and went to apologize to the principal, but the school administrators suspended Justin and prohibited him, among other things, from attending his graduation ceremony.[275]

After the district court granted summary judgment in Justin's favor on his First Amendment claim, the school district appealed.[276] The issue presented before the Third Circuit was whether a "school district can punish a student for expressive conduct that originated outside of the classroom, when that conduct did not disturb the school environment and was not related to any school sponsored event."[277] Although the district court found that the school district could not "establish[] a sufficient nexus between Justin's *speech* and a *substantial disruption* of the school environment"[278] (that is, make the disruption reasonably foreseeable), the school district did not challenge that finding on appeal.[279] The school district instead

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[272] *Id.*

[273] *Id.* Apparently, the principal never pressed charges.

[274] *Id.*

[275] *Id.* at 254.

[276] *See* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587 (W.D. Pa. 2007).

[277] *Layshock*, 593 F.3d at 251.

[278] *Layshock*, 496 F. Supp. 2d at 600 (emphasis added).

[279] *Layshock*, 593 F.3d at 259. It is worth noting that the school district did not appeal this straight *Tinker* analysis disputing the factual finding about the nexus between the profile and any disruption, but instead asserted that there was a "sufficient nexus . . . between Justin's creation and distribution of the vulgar and defamatory *profile* of Principal Trosch and the *School* . . . ." *Id.* (emphasis added). The difference may have been critical. Only a few courts (notably the Pennsylvania Supreme Court in *Bethlehem*, and the Second Circuit in *Wisniewski* and *Doninger*) have required a substantial nexus between the expression and the foreseeability that it will reach school *before* applying *Tinker* to determine whether the expression caused or

argued that "a sufficient nexus" existed between Justin's vulgar and defamatory *profile* of the principal and the *school* to permit the school district to regulate his conduct because the "speech" began on campus when he had "entered" school property—the website—and "misappropriated" the principal's picture[280]. In other words, the school district argued that the expression was not merely the equivalent of on-campus speech, but was speech *created* on campus. The school district also argued that it was reasonably foreseeable that the profile would come to the attention of the school district and the principal because it was aimed at the principal and the school community, and was accessed on campus by Justin.[281]

The Third Circuit rejected the argument that Justin had created a nexus between the profile and the school when he "entered" the school's website and "misappropriated" the principal's photo as too attenuated.[282] While recognizing that *Tinker*'s "schoolhouse gate is not constructed solely of the bricks and mortar surrounding the school yard," the court stated that the reach of school authorities is not without limits.[283] Citing *Morse*, the court stated that although speech could be restricted on campus or at a school, had a student "delivered the same speech in a public forum outside the school context, it would have been protected."[284] The Third Circuit panel refused to "allow the School District to stretch its authority so far that it reaches Justin while he is sitting in his grandmother's home after school."[285]

The court also upheld the district court's holding that the school's punishment of Justin was inappropriate under *Fraser* because there was no evidence that Justin fell within its narrow

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could reasonably be foreseen to cause some substantial disruption. Neither is binding on the Third Circuit. Had the school district appealed the holding under *Tinker*, it might have been able to establish, if not an actual substantial disruption, at least a reasonably foreseeable one that required the school district to take action.

[280] *Id.* at 259.

[281] *Id.*

[282] *Id.*

[283] *Id.* at 260

[284] *Id.* (quoting Morse v. Frederick, 551 U.S. 393, 404 (2007)) (internal quotation marks omitted).

[285] *Id.* at 260.

exception for lewd or offensive speech occurring at school.[286] Nor was the court swayed by the school district's reliance on *Bethlehem*, *Wisniewski*, or *Doninger*, where punishments were upheld for speech that originated off campus but made its way onto campus and created a substantial disruption.[287] The court distinguished *Bethlehem* on the "impact of the conduct," seemingly meaning a substantial disruption was present in *Bethlehem* but not in this case.[288] However, the Third Circuit later stated that because the school district failed to appeal the district court's finding that the profile did not disrupt the school, it would not "define the precise parameters of when the arm of authority can reach beyond the schoolhouse gate."[289]

Without commenting on *Wisniewski*, the court described and distinguished *Doninger* on the "consequences" of the expression—Doninger was prohibited from running for class president and Layshock was suspended.[290] However, the court was quick to point out that it did not "agree with that court's conclusion that the student's out of school expressive conduct was not protected by the First Amendment. . . ."[291] The court believed that the school districts' cases stood for "nothing more than the proposition that schools may punish expressive conduct that occurs outside of school as if it occurred inside the 'schoolhouse gate,' under certain very limited circumstances, none of which are present here."[292] The court therefore held that Justin's use of the school's website did not constitute entering the school such that the school district was empowered to punish his "out of school expressive conduct."[293]

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[286] *Id.* at 260, 263. The Third Circuit never commented on whether it found the expression to be lewd or offensive.

[287] *Id.* at 261-63.

[288] *Id.* at 261 n.17

[289] *Id.* at 263. The Third Circuit seemed to make the point that there was no substantial disruption, as required by *Tinker*, caused by the profile, while at the same time finding that it did not need to address the question because the issue was not raised on appeal.

[290] *Id.* at 262-63.

[291] *Id.* at 263.

[292] *Id.*

[293] *Id.* The Third Circuit's holding seemed to be that the case was outside the scope of *Tinker* because the speech occurred off campus, either because there was no nexus between the speech and the school as required by some cases as a threshold

In *J.S. ex rel. Snyder v. Blue Mountain School District*, however, a different three-judge panel split in affirming the district court's determination that the creator of a similar parody profile created off campus but making its way onto campus could be punished by the school.[294] In this case, J.S. and a friend created a profile of the school's principal on their home computers by copying his picture from the school's website and posting it to MySpace.[295] The profile did not state the principal's name but contained profanity-laced statements insinuating that he was a sex-addict and pedophile.[296] The students intended the profile to appear as a self-portrayal by the principal,[297] and the profile was set as "public," which made it available to anyone who knew the URL or found it by searching MySpace.[298] J.S. ostensibly created the profile because she was mad at the principal for his treatment of her over a dress code violation, and she thought it would be "comical."[299] J.S. later changed the setting to "private," but then "granted 'friend' status" to twenty-two other students so they could view the profile.[300]

Because the school's computers blocked access to MySpace, students could only view the profile from off-campus locations.[301] The principal subsequently learned about the profile when both a teacher and another student brought it to his attention.[302]

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consideration before applying *Tinker*, or simply because it refused to grant on-campus status to any case originating off campus, applying a straight geographic-based test to the expression, although the district court below had recognized that "the test for school authority is not geographical." Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 598 (W.D. Pa. 2007). The court's subsequent en banc opinion affirmed and determined that "[t]he School District's attempt to forge a nexus between the School and Justin's profile by relying upon his 'entering' the District's website to 'take' the District's photo of Trosch is unpersuasive at best." *Layshock*, 593 F.3d at 259. "The argument equates Justin's act of signing onto a web site with the kind of trespass he would have committed had he broken into the principal's office or a teacher's desk; and we reject it." *Id.*

294 593 F.3d 286, 290 (3d Cir. 2010).

295 *Id.* at 291.

296 *Id.* at 290.

297 *Id.* at 291.

298 *Id.* at 292.

299 *Id.*

300 *Id.*

301 *Id.*

302 *Id.*

However, only a single copy of the profile was found at school.[303] The principal later found out that J.S. had created the profile, and although she initially denied it, she later admitted to creating it and was suspended.[304]

The profile's "effect"[305] at school was the creation of general "rumblings" both in and out of class, such that teachers had to quiet their classes.[306] Additionally, several counseling sessions were cancelled when the school's investigation required the school's personnel to assume additional duties.[307] Finally, fellow students decorated J.S.'s locker and congregated in the hallways to welcome J.S. back from her suspension.[308]

The district court granted the school summary judgment, acknowledging that although there was not a substantial disruption sufficient to satisfy *Tinker*, based on the facts of the case and "because the lewd and vulgar off-campus speech had an effect on-campus," the school had not violated J.S.'s rights by disciplining her; J.S. subsequently appealed. [309]

Although the district court applied *Fraser* to uphold the school's authority to punish J.S. because her profile was "vulgar, lewd, and potentially illegal speech that had an effect on campus,"[310] the Third Circuit declined to decide whether *Fraser* applied to off-campus speech that has an effect on campus because it concluded that the profile, although created off campus, fell within the realm of *Tinker*.[311] It therefore did not employ the "two-step test" used by the district court to determine first, whether the speech came on campus due to its "effect" on the middle school, and then whether the school infringed on the student's rights by

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[303] *Id.*

[304] *Id.* at 292-93.

[305] *Id.* at 293.

[306] *Id.* at 294.

[307] *Id.*

[308] *Id.*

[309] *Id.* at 295 (quoting J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., No. 3:07cv585, 2008 WL 4279517, at *7-8 (M.D. Pa. Sept. 11, 2008)).

[310] *Blue Mountain*, 2008 WL 4279517, at *6.

[311] *Blue Mountain*, 593 F.3d at 298.

disciplining her.[312] Instead, the Third Circuit proceeded directly to a "*Tinker* inquiry."[313]

The court recognized that "[e]lectronic communication allows students to cause a substantial disruption to a school's learning environment even without being physically present,"[314] because of the potential for "rapid dissemination of information."[315] Accordingly, the court held that "off-campus speech that causes or reasonably threatens to cause a substantial disruption of or material interference with a school need not satisfy any geographical technicality in order to be regulated pursuant to *Tinker*."[316] The court was persuaded by the profile's "particularly disturbing content," and the fact that the profile presented a "reasonable possibility of a future disruption, which was preempted only by principal McGonigle's expeditious investigation of the profile, which secured its quick removal, and his swift punishment of its creators."[317] The court also held that regardless of whether the profile satisfied the elements of criminal harassment or defamation, because of its "undoubtedly offensive, potentially very damaging, and possibly illegal language," the "potential impact of the profile's language alone is enough to satisfy the *Tinker* substantial disruption test."[318]

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[312] *Id.*

[313] *Id.* In doing so, the Court recognized that it could, and was, affirming on alternate grounds. *Id.* at 298 n.5.

[314] *Id.* at 298 n.6.

[315] *Id.* at 301.

[316] *Id.*

[317] *Id.* at 300.

[318] *Id.* at 302. The court reasoned that although:

> [S]tudent speech that is critical of school officials is protected and not something we wish to censor generally, we distinguish such speech from the profile in the instant case that contained undoubtedly offensive, potentially very damaging, and possibly illegal language, including insinuations that strike at the heart of McGonigle's fitness to serve in the capacity of a middle school principal. We simply cannot agree that a principal may not regulate student speech rising to this level of vulgarity and containing such reckless and damaging information so as to undermine the principal's authority within the school, and potentially arouse suspicions among the school community about his character.

Id.

However, one member of the panel dissented, finding that the profile did not cause a substantial disruption, actual or foreseeable, because its content was so outrageous that it could not have been taken seriously.[319] He was "particularly troubled" that the majority found the potential impact of the profile's language sufficient to satisfy *Tinker*, believing that such a finding was "an application of the *Fraser* standard rather than the *Tinker* standard" and reasoning that "to focus on the vulgarity of the language is to allow the *Fraser* exception to swallow the *Tinker* rule."[320]

Less than two weeks later, the District Court for the Southern District of Florida cited *Layshock* and *Blue Mountain* in its opinion that a student's off-campus expression of her dislike of her English teacher on Facebook was protected within the First Amendment.[321] In *Evans v. Bayer*, a student, working on her home computer, created a group on Facebook entitled "Ms. Sarah Phelps is the worst teacher I've ever met."[322] The page contained Ms. Phelps' picture, but contained no threats of violence.[323] Three postings appeared on the page from other students supporting Ms. Phelps.[324] Ms. Phelps never saw the page, it did not disrupt school activities, and the student removed it after two days.[325] However, after its removal, the principal became aware of it and suspended the student and removed her from advanced placement classes.[326] The student brought suit alleging that the disciplinary action violated her First Amendment rights.[327]

The district court cited *Blue Mountain*, *Doninger*, and *Wisniewski* for the proposition that off-campus speech could be subject to analysis under *Tinker* if it "raises on-campus concerns."[328] Citing *Bethlehem*, the court stated that where the

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[319] *Id.* at 316 (Chagares, J., dissenting).

[320] *Id.* at 317.

[321] Evans v. Bayer, 684 F. Supp. 2d 1365 (S.D. Fla. 2010).

[322] *Id.* at 1367.

[323] *Id.*

[324] *Id.*

[325] *Id.*

[326] *Id.*

[327] *Id.* at 1368. The student also alleged that her punishment resulted in an "unjustified strain on her academic reputation and good standing." *Id.*

[328] *Id.* at 1370.

expression was created must be determined at the outset to decide whether the "unique concerns" of the school are implicated.[329] However, citing *Morse*, the court reasoned that "the operative test is not a simple one of geography. Where the speech is published is not the only question that needs to be asked."[330]

The court considered *Bethlehem* and determined that "student speech concerns are implicated when speech published off-campus is brought on-campus" or accessed at school, [331] especially when that "speech . . . is aimed at a specific school and/or its personnel."[332] The court found this test not easily suited to "intangible situations like the [I]nternet," although realizing that some guise of it could control.[333] The court thus considered another "possibility," which would be "whether the speech is directed at a particular audience," which, while problematic in some instances, was "much more simple" and not "fundamentally unsound."[334] However, the court found that the simple fact that the speech was aimed at a particular audience at the school was not enough to render it on-campus speech when it was created off campus, was never accessed on campus, and was no longer accessible when the principal learned of it.[335]

The court next compared Evans' speech to Layshock's and found that because her posting did not occur at a school-sponsored event, and she had not even gone as far as Layshock and accessed it at school, the posting was off-campus speech over which the school's authority was "far less reaching."[336] The court determined that under *Tinker*—as reinforced by the Third Circuit in *Blue Mountain*—the test was whether the school had a "well-founded

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[329] *Id.*

[330] *Id.* at 1371.

[331] *Id.*

[332] *Id.* (quoting J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (Pa. 2002)) (internal quotation marks omitted).

[333] *Id.*

[334] *Id.* The court found this test problematic in that it "would prohibit students from publishing a newspaper off-campus aimed at other students and distributing that paper off-campus, a scenario which has been decided in favor of the students[,]" but ultimately decided that "any test is going to be over or under inclusive." *Id.*

[335] *Id.* at 1371-72.

[336] *Id.* at 1372-73.

belief that a 'substantial' disruption [would] occur."[337] The court found no such well-founded expectation of disruption,[338] and thus determined that Evans' speech fell within the "wide umbrella of protected speech."[339]

To date, these eleven cases are the only cases addressing internet expression created off campus but ultimately arriving on campus. Perhaps because of that, courts have been diligent in reviewing and applying the past precedent, and some clear patterns appear, as well as some trends. From 1998 to 2002, four cases came to various federal district courts, and each court found that the students' First Amendment rights had been violated.[340] In none of the cases did the creator intend the expression to make its way to campus, or bring the expression to campus himself.[341] Two of these cases, *Beussink* and *Killion*, involved crude, vulgar language,[342] and two, *Emmett* and *Mahaffey*, involved expression touching upon death or killing generally, but not threatening a specific person.[343] Yet, in *Beussink*, *Emmett*, and *Killion*, the courts seemed to focus more on the creator's *intent* than on the expression's *content*, expressly refusing to consider "[d]isliking or

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[337] *Id.* at 1373. (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969)). The court relied on the district court's opinion in *Layshock* for the proposition that "[a] mere desire to avoid discomfort or unpleasantness will not suffice . . . ." *Id.* (quoting Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 597 (W.D. Pa. 2007)). The court also relied on the Third Circuit's decision in *Blue Mountain* for the determination that a "showing of past incidents arising out of similar speech may pass muster." *Id.* (citing J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286 (3d Cir. 2010)).

[338] *Id.*

[339] *Id.* at 1374. In an unusual aside, the court stated that although it agreed that "a school should not condone the use of vulgar or lewd language, quite simply, the case at hand does not involve the same type of speech as *Fraser*, nor is it in the same context. Evans' Facebook group does not undermine the 'fundamental values' of a school education." *Id.* It is unclear whether the court was implying that truly lewd and offensive speech originating off campus *could* come within *Fraser*.

[340] *See* Mahaffey v. Aldrich, 236 F. Supp. 2d 779, 782 (E.D. Mich. 2002); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 448 (W.D. Pa. 2001); Emmett v. Kent Sch. Dist., 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1177 (E.D. Mo. 1998).

[341] *See Mahaffey*, 236 F. Supp. 2d at 786; *Killion*, 136 F. Supp. 2d at 448; *Emmett*, 92 F. Supp. 2d at 1089; *Beussink*, 30 F. Supp. 2d at 1177.

[342] *Killion*, 136 F. Supp. 2d at 448; *Beussink*, 30 F. Supp. 2d at 1177.

[343] *Mahaffey*, 236 F. Supp. 2d at 782 (asks readers to kill); *Emmett*, 92 F. Supp. 2d at 1089 (obituaries).

being upset by the content"[344] of the expression or "undifferentiated fears of possible disturbances"[345] sufficient reason for limiting a student's speech under *Tinker*. And, despite lewd or offensive content, these courts refused to apply *Fraser*. In *Mahaffey*, the court simply found that the content of the website was not a "true threat," and found no substantial disruption under *Tinker*.[346]

However, beginning with *Bethlehem* and continuing in the next three cases beyond it, the courts found the student expression was not protected.[347] The expressions in *Bethlehem*, *Wisniewski*, and *O.Z.* involved expression advocating the killing of a specific person,[348] and in *Bethlehem* and *O.Z.* those persons were truly frightened and suffered mental and physical distress,[349] while the teacher in *Wisniewski* was "distressed" enough to report it to the school who called the police.[350] In *Wisniewski* and *O.Z.*, the courts found that the speech was not protected despite the creator's lack of intent to have the expression come onto campus (although O.Z. had shared it with a third person).[351] In *Doninger*, the expression was created for the express purpose of reaching campus and causing a disruption and "pissing off" administrators.[352]

In these cases, the *content* of the expression, especially when coupled with intent to have the expression make its way to campus, was sufficient for the courts to find the expression

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[344] *Killion*, 136 F. Supp. 2d at 455; *Beussink*, 30 F. Supp. 2d at 1180.

[345] *Emmett*, 92 F. Supp. 2d at 1090 (quoting Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988)).

[346] *Mahaffey*, 236 F. Supp. 2d at 784-86.

[347] The 2007 *Layshock* district court decision breaks the chain and was upheld by the Third Circuit in 2010. *See* Layshock v. Hermitage Sch. Dist., 593 F.3d 249 (3d Cir. 2010). But since that opinion has been vacated with no further word from the court to date, this discussion will not include the *Layshock* district court opinion in the discussion of the pattern emerging with *Bethlehem*.

[348] Wisniewski v. Bd. of Educ., 494 F.3d 34, 36 (2d Cir. 2007); O.Z. v. Bd. of Trustees, No. 08-5671, 2008 WL 4396895, at *1 (C.D. Cal. Sept. 9, 2008); J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 851 (Pa. 2002).

[349] O.Z. v. Bd. of Trustees, No. 08-5671, 2008 WL 4396895, at *1 (C.D. Cal. Sept. 9, 2008); *Bethlehem*, 807 A.2d at 847.

[350] *Wisniewski*, 494 F.3d at 36.

[351] *Id.* at 38-40; *O.Z.*, 2008 WL 4396895, at *4.

[352] Doninger v. Niehoff, 527 F.3d 41, 45 (2d Cir. 2008).

unprotected. The expression would foreseeably[353] end up on campus because of the fear or interest it would cause in the school community,[354] and once there, it would cause or portend a substantial disruption, creating what has been called a "passive telepresence."[355]

It may be that sufficient time had passed since the first case in 1998 for courts to see the impact that telepresence could have on campus, regardless of the intent of the creator to bring the speech onto campus. Additionally, from the time of *Wisniewski*, these courts looked also to *Morse*, which has been described as the first of the Supreme Court's student speech opinions to venture into "content-based regulation" of student speech.[356] In any case, a distinct pattern occurs in these cases as the courts began to find that the *content* of the expression was directly correlated to the foreseeability of the expression making its way onto campus and portending disruption.

However, in 2010, the Third Circuit's decisions in *Layshock* and *Blue Mountain* seemed to strike out in other directions, perhaps fueling its decision to vacate both opinions and re-evaluate. In fact, these cases almost seem to be decided backwards, using a strict *Tinker* analysis. In *Layshock*, where both the district court and the Third Circuit panel found that the student's expression was protected under *Tinker*, there was a direct attack on a specific person within the school, which was

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[353] The ease of obtaining internet expression is clearly what distinguishes it from other off-campus speech. Although possible, it is not reasonably foreseeable, for example, that a student writing untoward comments about another member of the school community in her diary is going to have that expression make its way onto campus without her intent or consent. The diary expression requires the speaker's active participation to bring the speech on campus. The internet speaker's intent is irrelevant. It is not for nothing that federal authorities and child safety advocates advise parents to warn their children not to post anything online that they would not want others to see or read. *See* Brad Bechler, *"Online 'Sextortion' of Teens Rising—Sexual Extortion—What is it and How to Prevent it?*, GATHER NEWS (Aug. 16, 2010), http://news.gather.com/viewArticle.action?articleId=281474978448754.

[354] Most students create websites because of the relationships formed in school. "If the parties had not attended the same school, the speech would not likely exist." Servance, *supra* note 7, at 1237.

[355] Pike, supra note 32, at 1002.

[356] Nairn, *supra* note 130, at 247.

crude and offensive.[357] The victim of that speech, as the victims in *Bethlehem*, *Wisniewski*, and *O.Z.*, was "shocked" by the expression, and while not afraid for his safety—just as VanderMolen was not in *Wisniewski*—felt the expression was "degrading" to the point he thought about filing suit against Layshock for defamation or slander,[358] just as the school in *Wisniewski* had gone to the police.

In addition to the crude and offensive *content*, which the district court admitted was similar to *Bethlehem*, although less extreme,[359] Layshock actually accessed the website on campus, from a school computer, showing his *intent* to bring the expression on campus.[360] This is similar to the student in *Bethlehem* who told others about the site and showed it at school, the student in *Doninger* who intended the readers to contact and "piss off" the school's administration, and the student in *O.Z.* who showed the site to another student.[361] With content that was nearly as onerous as that in *Bethlehem*, *Wisniewski*, and *O.Z.*, coupled with an intent to bring the expression on campus by actually accessing it there, as did the student in *Bethlehem*, the court could seemingly have found that the content of the speech made it foreseeable that it would reach the school—regardless of whether Justin accessed it there himself—because it was about a specific member of the school community and, if not actually causing a disruption of the proportions present in *Bethlehem*, making it reasonably foreseeable that such a disruption would occur.

The district court admitted that although there were clear parallels between *Bethlehem* and *Layshock*, it choose to reach a "slightly different balance between student expression and school authority,"[362] without further explanation, in what the court

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[357] Layshock v. Hermitage Sch. Dist., 593 F.3d 249, 252, 260 (3d Cir. 2010).

[358] *Id.* at 253.

[359] *Id.* at 261 n.17 (citing Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 602 (W.D. Pa. 2007)).

[360] *Id.* at 591.

[361] *See* Doninger v. Niehoff, 527 F.3d 41, 45 (2d Cir. 2008); O.Z. v. Bd. of Trustees, No. 08-5671, 2008 WL 4396895, at *4 (C.D. Cal. Sept. 9, 2008); J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 851-52 (Pa. 2002).

[362] *Layshock*, 496 F. Supp. 2d at 602.

admitted was a "difficult case."[363] On appeal, however, the Third Circuit refused to apply *Tinker* to Justin's expression because it had been created off campus and no subsequent event turned it into on-campus expression. It then went further than the district court, determining that *Bethlehem* was not even "on point," because of the difference in "impact" (the actual disruption) the speech had on campus.[364] The court also distinguished *Doninger* on the less serious consequences to the student, and in addition, disagreed with the Second Circuit's overall decision.[365]

In *Blue Mountain*, however, a student created a similar parody profile that, while not naming the principal, included his picture, obtained from the school's website, and stated that he was a sex addict and a pedophile.[366] J.S. created the profile because she was "mad" at the principal, and therefore set the profile as "public," which made it possible for anyone on the Internet to see the expression, and also "friended" twenty-two students.[367]

The court directly applied *Tinker*, without engaging in *Bethlehem*'s two-step analysis that first requires a court to find that the off-campus speech will foreseeably come onto campus.[368] The court recognized that because of its "rapid dissemination of information,"[369] internet expression makes it possible to cause a substantial disruption of the school environment without the student being "physically present."[370] That possibility becomes reasonably foreseeable, according to the *Blue Mountain* court, when the content is sufficiently disturbing, in which case "the potential impact of the profile's language alone is enough to satisfy the *Tinker* substantial disruption test."[371] Therefore, the court found *Tinker* satisfied despite the profile having been

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[363] *Id.* at 595.
[364] *Layshock*, 593 F.3d at 261 n.17.
[365] *Id.* at 263.
[366] J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 290 (3d Cir. 2010).
[367] *Id.* at 292.
[368] J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 864 (Pa. 2002).
[369] *Blue Mountain*, 593 F.3d at 301.
[370] *Id.* at 298 n.6.
[371] *Id.* at 302.

created off campus and despite the mere "rumblings" that *actually* occurred on campus.[372]

Layshock and *Fraser* then reached very different conclusions on similar facts. Yet, the disruption was certainly greater in *Layshock*, as was the principal's reaction to the parody profile. The difference in the cases was due entirely to how the different three-judge panels viewed the nature of the off-campus speech that came onto campus. The Third Circuit en banc decision will have to determine which route that court will take.[373]

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[372] *Id.* at 294.

[373] As this Article is being prepared for publication, the Third Circuit has handed down decisions in both cases that find the student's First Amendment rights violated because the speech was created off campus, requiring a "substantial disruption," or threat of one, in order to bring them within the Supreme Court's *Tinker* exception. The Court found no such disruption in either case. Therefore, the Third Circuit upheld the panel decision in *Layshock* but reversed on that issue in *Blue Mountain*. In *Layshock*, the decision relied on the fact that the school district had not argued that the profile created a substantial disruption. Layshock v. Hermitage Sch. Dist., 650 F.3d 205, at *11 (3d Cir. 2011) (en banc). In *Blue Mountain*, the court reasoned that there was no substantial disruption and no reasonable fear that a substantial disruption was likely to occur:

> J.S. created the profile as a joke, and she took steps to make it 'private' so that access was limited to her and her friends. Although the profile contained McGonigle's picture from the school's website, the profile did not identify him by name, school, or location. Moreover, the profile, though indisputably vulgar, was so juvenile and nonsensical that no reasonable person could take its content seriously, and the record clearly demonstrates that no one did.

J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 929 (3d Cir. 2011). These cases demonstrate that *Tinker* is still the central battleground in off-campus student speech cases; the *Tinker* standard of reasonably foreseeable substantial disruption is the first step of any analysis. Until the Supreme Court hears a case of off-campus speech, there will continue to be the confusion that cases like *Blue Mountain* and *Layshock* create, and splits on the issue, as between the Second and Third Circuit Courts. However, a few days after *Layshock* and *Blue Mountain*, the Supreme Court ruled in favor of children's First Amendment right to buy, rent, and watch violent video games—holding a California law restricting the sale or rental of violent video games to minors unconstitutional. *See* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011). The Court reiterated:

> [A]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . There are of course exceptions. . . . These limited areas—such as obscenity, . . . incitement, . . . and fighting words, . . . represent well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.

The final case, *Evans v. Bayer*, considered the Third Circuit's decisions in *Layshock* and *Blue Mountain*, and came down on the side of *Layshock*, although with facts that were much more susceptible to holding the student expression protected.[374] Evans' "worst teacher" page was not threatening, her teacher never saw the page, and Evans removed the page before the school ever became aware of it.[375] The court recognized *Bethlehem* and its progeny as standing for the undisputed proposition that student expression might not be protected when it is created off campus but brought onto campus or actually accessed at school, especially when aimed at the school or one within the school community.[376] However, the court limited *Bethlehem*'s rationale to instances in which the expression was actually accessed on campus, and did not find that the mere content of the expression—the fact that the expression was targeted at a member of the school community—was sufficient to make such expression on-campus speech.[377] The court also refused to find that the school could have a "well-founded belief that a 'substantial' disruption [could] occur" merely because the expression targeted a member of the school community.[378]

In the dozen years of specifically internet-related student speech cases, it has become clear that "[t]he place of origination has little relation to the disruption [of] the school environment."[379] However, synthesis of these eleven cases shows that the decisions

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Id. at 2733 (internal citations and quotation marks omitted). However, the Court also reiterated that "new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated." *Id.* at 2734. The Court therefore seems unlikely to resolve any dispute over the Third Circuit's recent decisions in favor of the school districts, despite Justice Thomas' dissenting view that the First Amendment does not reach to minors at all. He argues that "[t]he practices and beliefs of the founding generation establish that 'the freedom of speech,' as originally understood, does not include a right to speak to minors (or a right of minors to access speech) without going through the minors' parents or guardians." *Id.* at 2751 (Thomas, J., dissenting).

374 Evans v. Bayer, 684 F. Supp. 2d 1365 (S.D. Fla. 2010).

375 *Id.* at 1367.

376 *Id.* at 1371.

377 *Id.*

378 *Id.* at 1373.

379 Servance, *supra* note 7, at 1215.

are "highly fact-specific,"[380] and the strongest scenarios for legitimate school restriction of cyber-expression are, in descending order, those in which: (1) the expression conveys a threat against a specific person, coupled with an intent that the expression be seen on campus and causes that person physical and/or emotional distress (*Bethlehem*);[381] (2) the expression conveys a threat against a specific person that is not specifically intended to be accessed on campus and causes that person physical and/or emotional distress (*O.Z.*);[382] (3) the expression conveys a threat against a specific person that is not specifically intended to be accessed on campus and causes no real distress to that person (*Wisniewski*);[383] (4) lewd, vulgar, or offensive expression directed at a particular person, which is intended to be accessed on campus but causes the targeted person no reported distress (*Blue Mountain*);[384] and (5) vulgar, offensive expression that is intended to make its way onto campus and cause disruption, and actually does so (*Doninger*).[385] Within this context, *Layshock* stands out as a case for reconsideration, since the expression was vulgar and offensive, directed at a particular member of the school community, and intended to be accessed on campus.[386]

On the other hand, cases in which the creator of the expression had no intent for the expression to reach campus, coupled with another mitigating factor, will not suffice: (1) no intent and no one saw the expression on campus (*Beussink*);[387] (2) no intent, and although seen, no one was distressed by it (*Emmett*);[388] (3) no intent, and although reaching campus, the expression was not immediately discovered or discussed (*Killion*);[389] and (4) no intent, no threat, and no specific target (*Mahaffey*).[390]

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[380] *See, e.g.*, Vander Broek et al., *supra* note 19, at 20.
[381] *See supra* notes 210-37 and accompanying text.
[382] *See supra* notes 251-57 and accompanying text.
[383] *See supra* notes 233-42 and accompanying text.
[384] *See supra* notes 294-320 and accompanying text.
[385] *See supra* notes 243-50 and accompanying text.
[386] Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 591 (W.D. Pa. 2007).
[387] *See supra* notes 171-81 and accompanying text.
[388] *See supra* notes 182-90 and accompanying text.
[389] *See supra* notes 191-200 and accompanying text.
[390] *See supra* notes 201-09 and accompanying text.

This above synthesis also indicates the relevance of targeting a specific individual whose privacy right to be "let alone" has been impacted in regulating such speech (*Bethlehem*, *O.Z.*).[391] In fact, as the district court in *Blue Mountain* realized, "the protections provided under *Tinker* do not apply to speech that invades the rights of others . . . . [T]he speech at issue affected McGonigle's rights. As a principal of a school, it could be very damaging to have a profile on the [I]nternet indicating that he engages in inappropriate sexual behaviors."[392]

Finally, although lewd, vulgar, and offensive speech (*Doninger*), especially when targeted at a specific individual within the school community (*Bethlehem*, *Blue Mountain*), presented a valid reason for regulating the speech, only the Pennsylvania Supreme Court in *Bethlehem* and the district court in *Blue Mountain* have been willing to extend *Fraser* to speech created off campus but foreseeably making its way onto campus, "even though it arguably did not cause a substantial disruption of the school."[393]

III. *J.C. EX REL. R.C. V. BEVERLY HILLS UNIFIED SCHOOL DISTRICT*: STUDENT-ON-STUDENT INTERNET ATTACKS

It is against the above synthesis of cases that *J.C. ex rel. R.C. v. Beverly Hills Unified School District*[394] makes its entry into the internet expression arena. In fact, Judge Stephen Wilson specifically amended his November 16, 2009 opinion in the case to take into consideration the Third Circuit's opinions in *Layshock* and *Blue Mountain*.[395] The problem, as Judge Wilson points out,

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[391] *Layshock* would certainly seem to fit here. Additionally, as both the district court and the Third Circuit noted in *Blue Mountain*, the principal's *property* right to practice his profession was also impacted by the expression calling him a sex addict and a pedophile. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 302 (3d Cir. 2010); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., No. 3:07cv585, 2008 WL 4279517, at *6 n.4 (M.D. Pa. Sept. 11, 2008).

[392] *Blue Mountain*, 2008 WL 4279517, at *6 n.4.

[393] *Id.* at *6.

[394] J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094 (C.D. Cal. 2010).

[395] Although the amended opinion is dated May 6, 2010, Judge Wilson clearly wrote the opinion before the Third Circuit, sitting en banc, vacated both opinions on April 9, 2010. *Id.* at 1097 n.1.

is that there have been no prior cases that address expression by one student targeted at another student;[396] the eleven internet expression cases all concerned student expression targeted at the school or one of its administrators or teachers.

Beverly Hills, however, is a true "cyber-bullying" case in which a student, through her parents, sued her school, after it suspended her for posting a video maligning another student on YouTube.[397] In that case, the plaintiff, J.C., and her thirteen-year-old friends, gathered at a nearby restaurant and recorded a four and one-half minute video on her personal recording device, after having been dismissed from school for the day.[398] On the video, J.C. and her friends talked about their classmate, C.C., and one of J.C.'s friends called C.C. a "slut," "spoiled," and "the ugliest piece of shit I've ever seen in my whole life," while also talking about "boners," and using profanity throughout.[399]

Later that evening, J.C. posted the video on YouTube from her home computer and contacted five to ten students from the high school, including C.C., and told them to look at the video.[400] The video received ninety "hits" that evening.[401] The next morning, J.C. overheard at least ten students discussing the video,[402] and ultimately, nearly half the eighth grade class saw the video.[403] Students could not access YouTube on the school computers, and cell phones that had Internet capability were prohibited from being used on campus; consequently, there was no evidence that any student viewed the video from a cell phone while at school.[404]

C.C. came to school with her mother that morning to make the school aware of the video.[405] C.C. spoke with the school counselor and was crying when she told the counselor that she did

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[396] *Id.* at 1111. The court does not mention *Coy v. Board of Education*, 205 F. Supp. 2d 791 (N.D. Ohio 2002). *See supra* note 6.

[397] *Id.* at 1098-99.

[398] *Id.* at 1098.

[399] *Id.*

[400] *Id.*

[401] *Id.*

[402] *Id.*

[403] *Id.* at 1120.

[404] *Id.* at 1099.

[405] *Id.* at 1098.

not want to go to class because she felt humiliated.[406] After twenty to twenty-five minutes of counseling, C.C. was convinced to return to class, and ultimately only missed part of her first class.[407]

School administrators viewed the video while on campus and then demanded that J.C. delete it.[408] They also questioned the other students involved in making the video, one of whose father came to campus, watched the video, and then took his daughter home for the rest of the school day.[409]

Ultimately, the school only took disciplinary action against J.C., who had a prior history of secretly videotaping her teachers, for which she had been suspended and told not to make further videos on campus.[410] During the investigation of the current incident, school administrators discovered another video that J.C. had posted on YouTube of two friends talking on campus, clearly made while at school.[411] After the investigation, J.C. was suspended from school for two days. [412] J.C., through her parents, sued the school for violation of her constitutional rights, and the parties filed cross motions for summary adjudication.[413]

Judge Stephen Wilson determined that to resolve the issue, the court had to "determine the scope of a school's authority to regulate speech by its students that occurs off campus but has an effect on campus."[414] To do so, he considered the quartet of Supreme Court precedents on student speech and determined that neither *Hazelwood* nor *Morse* applied[415] because the expression neither "bore the 'imprimatur' of the school,"[416] nor could reasonably be construed as promoting drug use.[417] Nor did he apply *Fraser*, because it has been limited to speech that originates

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[406] *Id.*
[407] *Id.*
[408] *Id.* at 1098-99.
[409] *Id.* at 1099.
[410] *Id.*
[411] *Id.*
[412] *Id.*
[413] *Id.* at 1097.
[414] *Id.* at 1100.
[415] *Id.* at 1109.
[416] *Id.* (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988)).
[417] *Id.* (citing Morse v. Frederick, 551 U.S. 393 (2007)).

on campus, reasoning that a school has the power to determine what speech is appropriate in its classrooms and assemblies.[418]

Thus, the court found that *Tinker* applied to determine "whether a school can regulate student speech or expression that occurs outside the school gates, and is not connected to a school-sponsored event, but that subsequently makes its way onto campus, either by the speaker or by other means."[419] The court then considered the Ninth Circuit's decision in *LaVine v. Blaine School District*,[420] which determined that a violent and graphic poem about killing classmates—written off campus but later brought to campus and shown to a teacher—was not protected, applying *Tinker*'s substantial disruption test, and "conclud[ing] that the school was reasonable to portend a substantial disruption."[421]

The court also considered the Second Circuit's approach, which considers the location of the speech as an important threshold question to be resolved before applying *Tinker*, requiring a "nexus" between the expression and the school before applying the substantial disruption test.[422] The court ultimately synthesized all these cases and concluded:

> [T]he majority of courts will apply *Tinker* where speech originating off campus is brought to school or to the attention of school authorities, whether by the author himself or some other means. The end result established by these cases is that any speech, regardless of its geographic origin, which causes or is foreseeably likely to cause, a substantial disruption of school activities can be regulated by the school. Second, some courts will apply the Supreme Court's student speech

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[418] *Id.* at 1110 (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).

[419] *Id.* at 1102-03.

[420] LaVine v. Blaine Sch. Dist., 257 F.3d 981 (9th Cir. 2001).

[421] *Beverly Hills*, 711 F. Supp. 2d at 1103 (citing *LaVine*, 257 F.3d at 992). The court recognized that "many other courts analyzing off-campus speech that subsequently is brought to campus or to the attention of school authorities apply the substantial disruption test from *Tinker* without regard to the location where the speech originated (off campus or on campus)," and "have directly applied the *Tinker* substantial disruption test to determine if a First Amendment violation occurred, without first considering the geographic origin of the speech." *Id.* at 1103-04.

[422] *Id.* at 1104-05 (citing Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008); Wisniewski v. Bd. of Educ., 494 F.3d 34 (2d Cir. 2007)).

> precedents, including *Tinker*, only where there is a sufficient nexus between the off-campus speech and the school. It is unclear, however, when such a nexus exists. The Second Circuit has held that a sufficient nexus exists where it is "reasonably foreseeable" that the speech would reach campus. The mere fact that the speech was brought on campus may or may not be sufficient.[423]

Applying these principles, the Court found that the plaintiff's "geography-based argument . . . that the School could not regulate the YouTube video because it originated off campus," failed under both *LaVine* and the Second Circuit's approaches, because "the YouTube video clearly ha[d] a sufficient connection to the Beverly Vista campus," and actually made its way onto campus.[424] The court reasoned that content may increase the likelihood that the expression will reach campus, finding that "[c]ases considering the relationship between off-campus speech and the school campus more readily find a sufficient nexus exists where speech over the Internet is involved."[425]

After finding that *Tinker* applied to both off-campus speech and on-campus speech, the court considered whether the video "created, or was reasonably likely to have created, a substantial disruption of school activities," and found that it did not.[426] The court determined that while the disruption did not need to rise to the level of "complete chaos,"[427] it must be more than a "mild distraction,"[428] or creating a "mere 'buzz'"[429] on campus. However, the court acknowledged that violent or threatening expression could reasonably portend disruption.[430] But ultimately the court found that what was required was that the school's decision to discipline be based on evidence or facts, rather than

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[423] *Id.* at 1107.

[424] *Id.* at 1107-08.

[425] *Id.* at 1108 (citing *Wisniewski*, 494 F.3d 34; *Doninger*, 527 F.3d 41).

[426] *Id.* at 1110, 1122.

[427] *Id.* at 1111 (quoting J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 868 (Pa. 2002)).

[428] *Id.*

[429] *Id.* at 1112.

[430] *Id.*

"undifferentiated fears or mere disapproval."[431] Only "where 'a school can point to a well-founded expectation of disruption–especially one based on past incidents arising out of similar speech–the restriction may pass constitutional muster.'"[432]

Under these parameters, the court found any disruption *de minimus* when a few students missed some portion of classes on a single day, where the speech was neither violent nor threatening, no one's safety was ever in danger, and the student was merely embarrassed and was able to be counseled back to class.[433] Under such circumstances, the court found that the video could not be said to have had any effect on class activities.[434]

The court also considered the second prong of *Tinker*, which allows that a school may regulate student speech that "[collides] with the rights of other students to be secure and be let alone."[435] Although the court reasoned that "'speech that impinge[s] upon the rights of other students' may be prohibited even if a substantial disruption to school activities is not reasonably foreseeable," the court found "the precise scope of *Tinker*'s 'interference with the rights of others'" language unclear, and not often applied by lower courts.[436]

The defendant school district urged the court to follow a Ninth Circuit case, *Harper v. Poway Unified School District*, which held "that a student's decision to wear a T-shirt with a religious message condemning homosexuality during the school's 'Day of Silence' impinged upon the rights of other students under *Tinker*."[437] The court in *Harper* "held that student speech that

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[431] *Id.* at 1115.

[432] *Id.* at 1116 (quoting Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 212 (3d Cir. 2001)).

[433] *Id.*

[434] *Id.* at 1119.

[435] *Id.* at 1122 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)). This test has been determined to be independent of the other. *See supra* note 120.

[436] *Beverly Hills*, 711 F. Supp. 2d at 1122.

[437] *Id.* (citing Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006)). The *Harper* decision was vacated as moot because when "the case reached the Supreme Court on certiorari, the district court had entered final judgment dismissing plaintiff's claims for injunctive relief as moot." *Beverly Hills*, 711 F. Supp. 2d at 1122 n.16 (citing Harper v. Poway Unified School District, 549 U.S. 1262 (2007)).

attacks 'particularly vulnerable' students on the grounds of 'a core characteristic'—namely, race, religion, and sexual orientation—impinged on the rights of others and could be regulated under *Tinker*,"[438] but expressly limited its holding to speech attacking students on those three grounds, declining to extend its holding even to remarks based on gender.[439]

Although the defendants argued that *Harper* demonstrated that "California schools have an obligation to protect students from psychological assaults that cause them to question their self worth,"[440] the court refused to allow schools to "exercise this obligation in a manner that infringes upon other student's First Amendment rights."[441] The court found no "authority, including *Harper*, that extends the *Tinker* rights of others prong so far as to hold that a school may regulate any speech that may cause some emotional harm to a student."[442] The court declined to be the first.[443]

The question, then, is where does *Beverly Hills* stand within the parameters established by the previous cyber-expression cases? The first and most obvious distinction is that the cyber-expression in this case was directed at a fellow student, rather than at the school or one of its employees.[444] There are simply no cases directly on point.[445] The court notes the distinction,[446] but

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[438] *Id.* at 1123 (quoting *Harper*, 445 F.3d at 1182).

[439] *Id.*

[440] *Id.* (citing Defendant's Motion at 11, Harper v. Poway Unified School District, 549 U.S. 1262 (2007) (No. 06-595)).

[441] *Id.*

[442] *Id.*

[443] *Id.*

[444] *Id.* at 1098.

[445] *See* Willard, *supra* note 4, at 6. Nancy Willard has explained:

> One reason for the lack of case law is likely that there are very few attorneys[,] such [as] J.C.'s father, Evan Cohen, who filed the case, who are inclined to file a law suit against a school district arguing that students should have a First Amendment right to torment and harass other students.

Id. The Los Angeles Times reported Evan Cohen as explaining, "[T]he case highlighted the school district's failure to realize the limits of its authority. Yeah, sure, they can fall back on cyber-bullying, but when you actually ask them questions and dig down deep into their understanding, they think it's OK for them to be a super-parent." *See* Kim, *supra* note 4 (quoting Evan Cohen, the child's attorney and father) (internal quotation marks omitted).

makes nothing of it. But this difference from the other cyber-expression cases touches on the *nature* of the disruption that had or foreseeably would occur.

If *Tinker*'s substantial disruption test is the only test to be used in cyber-expression cases, it is important for courts to take note of the difference of that disruption in student-on-student attacks. When off-campus internet expression involves student online speech targeted at school administrators or teachers, the question of whether the speech has or foreseeably will cause a substantial disruption of general school activities in the larger sense is relevant.[447] However, when such speech is directly targeting a fellow student, there stands to be little or no such broad disruption. In *Beverly Hills*, there was no reported general disruption of classroom or school activities; the disruption of the school activity was to C.C., the targeted student.[448] The expression caused her to want to skip class, which she in fact did, until counseled back to class with the promise that the school was taking steps to put a stop to the attacks.[449]

Yet, as then-Judge Alito pointed out in *Saxe v. State College Area School District*, "The primary function of a public school is to educate its students; conduct that substantially interferes with the mission (including speech that substantially interferes with a student's educational performance) is, almost by definition, disruptive to the school environment."[450] As Nancy Willard, Director of the Center for Safe and Responsible Internet Use observed, "The inquiry should have focused on one question: Was

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[446] *Beverly Hills*, 711 F. Supp. 2d at 1111.

[447] Willard, *supra* note 4, at 6.

[448] *Beverly Hills*, 711 F. Supp. 2d at 1122.

[449] Willard, *supra* note 4, at 5. Willard observed:

> [C.C.'s] willingness to go to class was predicated on the fact that she knew that the school officials were intending to call the aggressors to the office and deal with the situation. The fact that the school officials at Beverly Vista School responded promptly and effectively to this situation was held against the district. Due to the district's effective disciplinary actions, the foreseeable significant interference with C.C.'s ability to participate in school activities was prevented!

Id. It should be noted that the creators of the expression also had their classroom day interrupted, as did administrators and counselors.

[450] Saxe v. State College Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001).

the speech of J.C. sufficiently severe or pervasive that it had or foreseeably would substantially interfere with C.C.'s educational performance and right to feel secure at school, and thus her right to receive an education?"[451]

Secondly, the expression certainly collided with the privacy rights of C.C. to be let alone and to receive and exercise her education, in which the Supreme Court has found a "property interest."[452] In *Harper*, the Ninth Circuit applied *Tinker*'s second test to find that wearing a T-shirt to school that condemned homosexuality impinged on the rights of other students, even though no substantial disruption occurred.[453] Although the court limited its holding to expression attacking "particularly vulnerable students" on a "core characteristic" such as race, religion, or sexual orientation," even dissenting Judge Kosinski recognized that *Tinker*'s "rights of others" test referred to "traditional rights, such as . . . invasion of privacy."[454]

Additionally, although the expression did not threaten C.C., it was lewd, vulgar, and offensive speech specifically about her, intended for her and other students to see, and actually brought to their attention.[455] It achieved its intention; it caused her humiliation, but not where it was originally created and not where it was initially read, but only at school where the expression had rather foreseeably made its way onto campus, where other students, eventually as much as half her class,[456] were discussing it. As such, the facts exceed those in *Blue Mountain*, where the lewd and vulgar speech caused the principal no reported distress—although certainly impacting other rights,[457] and brings it close to the expression causing the teacher distress in *Wisniewski*.[458] Although no other case has treated cyber-expression by one student targeted at another, the Third Circuit

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[451] Willard, *supra* note 4, at 5.

[452] Goss v. Lopez, 419 U.S. 565, 576 (1975).

[453] Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006).

[454] *Id.* at 1198 (Kozinski, J., dissenting).

[455] J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1098 (C.D. Cal. 2010).

[456] *Id.* at 1120.

[457] J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 302 (3d Cir. 2010).

[458] Wisniewski v. Bd. of Educ., 494 F.3d 34, 36 (2d Cir. 2007).

recognized in a case about the constitutionality of a school's racial harassment policy that "[i]ntimidation of one student by another, including intimidation by name calling, is the kind of behavior school authorities are expected to control or prevent. There is no constitutional right to be a bully."[459]

Finally, the expression would certainly have come within *Fraser* if J.C. and her friends had stood up in class, in the assembly hall, in the cafeteria, or on the athletic field[460] and made the same statements. In *Fraser*, the Court protected the rights of school children to be let alone, to be protected by the school from expression that was *generally* offensive and embarrassing, but in no way targeted any child herself.[461] Certainly, then, there is an argument to be made that a school child must also be protected from lewd, vulgar, and offensive expression that, although originating off campus, foreseeably makes its way onto campus and is *specifically* targeted at a child, causing her to feel "humiliated," regardless of the substantiality of any resultant overall school disruption. The Supreme Court's edict seems to apply equally in *Fraser*:

> The First Amendment does not prevent the school officials from determining that to permit [] vulgar and lewd speech . . . would undermine the school's basic educational mission. . . . [When] directed towards an unsuspecting audience of teenage students. . . . [V]ulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education.[462]

One is therefore forced to ask whether a student too cowardly to say such things to another student's face for risk of punishment (and J.C. had been suspended before for secretly videotaping her teachers and had posted another video on YouTube about her

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[459] Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 264 (3d Cir. 2002).

[460] The Supreme Court recognized that children's rights at school extended beyond the classroom and classroom hours, and included time spent "in the cafeteria, or on the playing field, or on the campus during authorized hours . . . ." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512-13 (1969).

[461] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 679 (1986).

[462] *Id.* at 685-86.

classmates that had clearly been made at school)[463] should be allowed to say them on the Internet, call them to the attention of the target and other students—virtually ensuring that the expression would come to campus the next day—and then be allowed to hide behind her computer and say that her expression is protected because it was not *initiated* on campus? Perhaps the Third Circuit's edict applies equally to cyber-expression: "Students cannot hide behind the First Amendment to protect their 'right' to abuse and intimidate other students at school."[464]

CONCLUSION: APPLYING THE "SUBSTANTIAL NEXUS" INQUIRY BEYOND *TINKER*

Unlike the political expression in *Tinker* that did not "intrude[] upon the work of the schools or the rights of other[s],"[465] J.C.'s expression may not have substantially disrupted the work of the school (except for that of the administrators and counselor), but it certainly disrupted C.C.'s work of getting an education and intruded upon C.C.'s right to be let alone and her privacy interest in her reputation.[466] The question is, whether and how to allow schools to regulate and punish such expression.

Certainly *Tinker* teaches that children's rights do not stop at the schoolhouse gate, but it also teaches that children's rights sometimes require modification in light of the "special characteristics of the school environment."[467] The Supreme Court has so far enumerated four instances where children's First Amendment rights may be modified—yet all of them require that the speech *originate* within the schoolhouse gates: Student expression may be regulated and punished when it occurs on campus and causes a substantial disruption,[468] when it occurs on campus and is lewd, vulgar, and offensive,[469] when it occurs on

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[463] *Beverly Hills*, 711 F. Supp. 2d at 1099.
[464] *Sypniewski*, 307 F.3d at 264.
[465] *Tinker*, 393 U.S.at 508.
[466] Prosser, *supra* note 1, at 398.
[467] *Tinker*, 393 U.S. at 506.
[468] *Id.* at 514.
[469] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

campus and bears the imprimatur of the school,[470] or when it occurs on campus and promotes drug use.[471] The Court in *Morse* later recognized that *Tinker*'s substantial disruption test was not "absolute,"[472] although rejecting the contention that *Fraser* encompassed "any speech that could fit under some definition of 'offensive.'"[473]

But the Court has also indicated that rights may need to be *balanced*, and the right to free speech on campus may not "colli[de] with the rights of other[s],"[474] although none of its cases give any real guidance about when this happens or *how* it happens. What is needed now is a fair and consistent way for schools to balance those rights in internet expression cases where speech is created off campus, and would otherwise be protected, but intentionally or foreseeably makes its way onto campus.

To that end, there have been various proposals for extending school authority over online speech created off campus. The broadest proposals simply call for universally applicable analysis of the expression under *Tinker*, regardless of inception of the speech,[475] or to treat *all* internet expression as on-campus speech if a student "knowingly [or] recklessly distributes the speech on-campus," regardless of the target.[476]

Others have found that *Tinker*'s "collision with the rights of other[s]" test is particularly pertinent in litigation involving student internet expression and apply it as the most reasonable solution.[477] However, one commentator finds the "better interpretation of *Tinker*'s . . . [second] prong . . . [is to] allow

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[470] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

[471] Morse v. Frederick, 551. U.S. 393, 397 (2007).

[472] *Id.* at 405.

[473] *Id.* at 409.

[474] *Tinker*, 393 U.S. at 508

[475] *See* Pike, *supra* note 32, at 997. This is essentially the method that lower courts have been using with inconsistent results. *See Tinker*, 393 U.S. at 506.

[476] Justin Markey, *Enough Tinkering with Students' Rights: The Need for an Enhanced First Amendment Standard to Protect Off-Campus Student Internet Speech*, 36 CAP. U. L. REV. 129, 132 (2007).

[477] McCarthy, *supra* note 22, at 1; Kellman, *supra* note 120, at 370. The only court to do so was the Ninth Circuit in *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006), later vacated by the Supreme Court "as moot" because the district court had entered final judgment. Harper v. Poway Unified Sch. Dist., 549 U.S. 1262 (2007).

schools to regulate student speech only when it has the potential to spark a physical assault."[478] The problem with this limitation, of course, is that it lends itself to a "true threat" analysis, which is more difficult to prove,[479] and leaves schools the tough job of determining just what speech has the potential to spark a physical assault.

Others have realized that because each internet expression case demands a fact-specific inquiry, what is needed is a "multi-factor analysis."[480] Several formulas have been proposed. Renee Servance suggests an "impact analysis," finding that schools may regulate if the target and creator of the internet expression are members of same school, the expression causes actual or foreseeable harm, and there is a disruption to the school's ability to educate or maintain classroom control.[481] Another, narrower, proposal is to treat student expression created off campus as protected, subject to review of whether it was viewed at school, whether and to what extent students discussed it on campus, and whether the school's measures against the perpetrator were appropriate.[482]

Nancy Willard, Director of the Center for Safe and Responsible Internet Use, proposes considering whether the expression was "sufficiently severe or pervasive that it had or foreseeably would substantially interfere with [a student's] educational performance and right to feel secure at school, and thus her right to receive an education."[483] She proposes:

> [T]his determination should be made based both on the subjective perspective of [the student], as well as an objective third party perspective – informed by research insight on bullying. . . . [in order to] effectively distinguish between student speech that is merely "offensive" but should be considered protected speech and speech that is truly harmful

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[478] Kellman, *supra* note 120, at 370.
[479] *See supra* note 47 and accompanying text.
[480] King, *supra* note 11, at 876.
[481] Servance, *supra* note 7, at 1239.
[482] King, *supra* note 11, at 876.
[483] Willard, *supra* note 4, at 5.

> and interfering with the right of another student to feel secure at school and receive an education.[484]

Whatever method might be employed, another obvious proposal is that schools should have to provide adequate notice that certain speech is prohibited in order not to raise due process concerns, and the actual punishment meted out must be reasonable.[485]

Beverly Hills, however, is a case calling into relief the need for courts to be liberated from applying *Tinker*'s substantial disruption requirement as the *only* test in student-on-student cyber-bullying cases, because, as has been shown in Part III,[486] it is not well-suited to addressing student cyber-expression targeting another student. To that end, a modest proposal: off-campus internet expression comprising a *student-on-student* attack that intentionally or foreseeably[487] makes its way onto campus, must be treated as on-campus speech.[488] To do so would merely extend

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[484] *Id.*

[485] Waldman, *supra* note 40, at 1114. The author of this proposal notes that this would raise the problem of self-censorship. Justice Stevens observed in his dissent in *Fraser* that it was "highly unlikely that [the student] would have decided to deliver the speech if he had known" the consequences. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 696 (1986) (Stevens, J., dissenting).

[486] *See supra* notes 445-49 and accompanying text.

[487] Benjamin Ellison has commented that treating cyber expression as on-campus speech when it is only reasonably foreseeable that it will come to campus is not enough to restrict student expression because the Internet is so readily available in school and elsewhere, that it is reasonably foreseeable that once speech is on the Internet, it will end up anywhere there is a computer and a user interested in accessing it—including at school. "Allowing schools to punish speech that merely reaches school, through a medium that essentially exists everywhere, would result in a strong chilling effect on student speech outside of school." Benjamin Ellison, *More Connection, Less Protection? Off-Campus Speech with On-Campus Impact*, 85 NOTRE DAME L. REV. 809, 844-45 (2010). While this is undoubtedly true, it is also the point in student-on-student attacks perpetuated via the Internet. Limiting restriction of expression reasonably foreseeable to come onto campus to *student-on-student attacks* will allow school officials, *in loco parentis*, to protect children's educational and privacy rights, rights that are not implicated in student-on school-employee cases. Teachers and administrators do not have a right to education at their school and adults would be presumed to be "adequately equipped emotionally and intellectually to deal with the type of verbal assaults that may be prohibited during their earlier years." Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1183 (9th Cir. 2006).

[488] This proposal is based on the "nexus" approach originated in *Bethlehem* and taken up by the Second Circuit. Those courts found that establishing a "sufficient

the general premise, adopted by the lower courts over the last twelve years in applying *Tinker*'s substantial disruption test, that "off-campus speech that causes or reasonably threatens to cause a substantial disruption of or material interference with a school need not satisfy any geographical technicality in order to be regulated."[489] This would, for example, allow schools to restrict and punish such expression that is clearly shown to "colli[de] with the rights of other students to be secure and to be let alone,"[490] or is lewd, vulgar, and offensive[491] to the child targeted, such that it impacts her ability to receive and participate in her education.

Although doing so will further limit students' freedom of expression, it is important to recognize that lewd, vulgar, offensive, or threatening expression by one student directed at a fellow student, is not an expression of "opinion . . . on controversial subjects," which *Tinker* so carefully sought to protect,[492] or "divergent political and religious views" that *Fraser* found must be tolerated even if unpopular.[493] Although name-calling aimed at other students is ordinarily protected outside the school context, lewd, vulgar, or offensive internet expression that intentionally or foreseeably makes its way onto campus, even when created off campus, targets students for *public* harassment within the enclosed environment of the schoolhouse gates. In the words of the *Fraser* Court, such speech must be "balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[494] "The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent or offensive speech. . . ."[495] The only stretch of *Fraser*'s restriction of such "manner" of speech is that of geographic

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nexus" between the expression that was created off campus and the school was enough to make it "on-campus" expression and bring it within *Tinker* to then consider whether the expression caused a substantial disruption of school activities. *See* discussion *supra* Part II.

489 J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 301 (3d Cir. 2010).

490 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (3d Cir. 2010).

491 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

492 *Tinker*, 393 U.S. at 513.

493 *Fraser*, 478 U.S. at 681.

494 *Id.*

495 *Id.* at 683.

origination, which the court in *Beverly Hills* and other internet expression cases now recognizes is "not material," at least to an application of *Tinker*.[496]

Secondly, as Renee Servance has observed, the theory that any harm such expression causes is outweighed by the greater danger of suppressing free speech may be appropriate for adults, but not for school children.[497] Studies show that a child's sense of and need for privacy develops as everyday experiences teach them about privacy as they are exposed to different interactions with themselves and their information.[498] "Very young children have difficulty in the conscious recognition of private space and private information. However, parallel to their psychological and social development, they learn the boundaries of personal space and the privacy of information."[499] "Childhood privacy practices are therefore inextricably intertwined in the child's developing cultural sense of autonomy in her upbringing."[500] "By adolescence, children are acutely aware of the significance of privacy, both territorial and informational."[501] Eventually, privacy becomes "volitional," and the need for adult supervision ceases, but until that time, a child's privacy protection is "subject to the 'whim' of her caretaker."[502]

And because school children are subject to mandatory attendance requirements, the Supreme Court has emphasized "the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive

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[496] J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1108 (C.D. Cal. 2010); *accord* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 598 (W.D. Pa. 2007) ("It is clear that the test for school authority is not geographical.").

[497] Servance, *supra* note 7, at 1214.

[498] Stuart, *supra* note 36, at 618.

[499] *Id.* at 620.

[500] *Id.* at 618.

[501] *Id.*

[502] *Id.* The Ninth Circuit, in *Harper v. Poway Unified School District*, similarly realized that limitations on student speech must be narrow, and limited its holding to conduct occurring in public elementary and high schools, because "[a]s young students acquire more strength and maturity, and specifically as they reach college age, they become adequately equipped emotionally and intellectually to deal with the type of verbal assaults that may be prohibited during their earlier years." 445 F.3d 1166, 1183 (9th Cir. 2006).

audience . . . ."[503] Schools have authority over some other off-campus conduct in certain circumstances where the conduct affects the school community,[504] and schools are in the best position to decide whether off-campus expression that intentionally or foreseeably is brought onto campus should be restricted in order to prevent substantial disruption or a collision with the rights of other students.

The negative effects of an invasion of a child's privacy right to be let alone by cyber-bullying has by now been well-documented, and as Alison King points out, the "negative effects of cyberbullying are often more serious and long-lasting than those of traditional forms of bullying."[505] As the Ninth Circuit recognized, such "psychological attacks . . . cause young people to question their self-worth and rightful place in society."[506] The Internet provides a "veil of anonymity," encouraging expression that might not otherwise have been made, as well as providing immediate access to it by endless others at the click of a mouse, and allowing the expression to remain indefinitely.[507] As such, it is "pervasive and prolonged abusive behavior," that can result in severe psychological damage, such as low self-esteem, anxiety, and depression leading to social withdrawal, as well as truancy, and ultimately can impair academic achievement.[508] There is also documentation that bullied children tend to strike back with violence either towards the bully, or others, or even themselves by suicide.[509]

Children such as thirteen-year-old C.C. have a right to be protected from these abuses that violate what the Supreme Court has called a "liberty interest in [their] reputation"[510] and a right to be let alone and receive and exercise their education. When student-against-student expression created off campus is shown to have a "nexus" to the school by being intentionally carried there

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503 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986).

504 *See supra* notes 36-38 and accompanying text.

505 King, *supra* note 11, at 850.

506 Kellman, *supra* note 120, at 371 (quoting *Harper*, 445 F.3d at 1178).

507 King, *supra* note 11, at 850.

508 Servance, *supra* note 7, at 1216-17.

509 *Id.* at 1217.

510 Goss v. Lopez, 419 U.S. 565, 576 (1975).

by its creator, or foreseeably making its way onto campus because its target is a fellow student and it contains prurient content intended to attract viewers in the school community, it should be treated as on-campus speech, allowing children's rights to be properly balanced under any of the Supreme Court's student speech exceptions. Such a classification would have allowed the court in *Beverly Hills* to consider the case under *Fraser* because the expression would have been considered on-campus speech, or used *Tinker*'s "collision with the rights of other[s]" test to restrict on-campus speech that collided with C.C.'s privacy rights.

THE NCAA LETTER OF INTENT: A VOIDABLE AGREEMENT FOR MINORS?

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INTRODUCTION

The National Letter of Intent (NLOI) program provides member schools a systematic way of recruiting student athletes.[1] But are these letters of intent binding on prospective players who

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[1] For an overview of the NLOI program, see Stacey Meyer, Comment, *Unequal Bargaining Power: Making the National Letter of Intent More Equitable*, 15 MARQ. SPORTS L. REV. 227, 227-31 (2004); Michael J. Riella, Note, *Leveling the Playing Field: Applying the Doctrines of Unconscionability and Condition Precedent to Effectuate Student-Athlete Intent Under the National Letter of Intent*, 43 WM. & MARY L. REV. 2181, 2185-88 (2002).

sign the agreement when they are minors? In 2008, a female basketball player signed a letter of intent to play for a Division I regional university.[2] Subsequently, the head coach for women's basketball at the university announced that she would be leaving to coach at a larger Division I school.[3] With the departure of the coach, the prospective player no longer wished to play for the university with which she had signed, and sought a release from her commitment; however, the university refused to release her. So she filed suit, claiming that her letter was invalid because she was not yet eighteen years old when she signed it, and thus under state law, the agreement was not binding.[4] A basic principle of contract law provides that minors can disaffirm agreements entered into during their minority.[5] Although the university ultimately released her from her letter of intent, the case highlights a potential problem with the NLOI program. While it is designed in part to inject rationality and order into a potentially chaotic recruiting process, the common law's infancy doctrine protects minors from improvident agreements made with potentially predatory adults.[6] This paper analyzes the right of a minor to disaffirm contracts in conjunction with the NLOI program.

I. THE NCAA NATIONAL LETTER OF INTENT PROGRAM

The National Collegiate Athletic Association (NCAA) is a well-funded, non-profit organization with over 1200 members that administers athletic issues in institutions of higher education.[7]

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[2] Tim Stevens, *Letters of Intent Might Not Stand Up*, NEWS & OBSERVER (Sept. 22, 2009 7:40 AM), http://www.newsobserver.com/2009/09/18/58399/letters-of-intent-might-not-stand.html; *see also* Luke DeCock, *Letter of Intent in College Athletics Is Faulty*, NEWS & OBSERVER (Aug. 8, 2010 4:49 AM), http://www.newsobserver.com/2010/08/08/619278/letter-of-intent-faulty.html (discussing the case and the issue of minors and letters of intent).

[3] DeCock, *supra* note 2.

[4] Stevens, *supra* note 2.

[5] JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS §§ 8.1-.9 (4th ed. 1998). Minors may also have a reasonable time to disaffirm a contract after reaching majority age. Sisneros v. Garcia, 613 P.2d 422, 423 (N.M. 1980).

[6] For a discussion of minority as a defense to an otherwise binding contractual arrangement, see *infra* notes 32-58 and accompanying text.

[7] GLENN M. WONG, ESSENTIALS OF SPORT LAW 17 (4th ed. 2010). In 2009–2010, the NCAA's total revenue stream exceeded $700,000,000, and its television revenue

Although the organization is voluntary, member schools are bound by the organization's regulations and must administer their athletic programs in accordance with NCAA rules.[8] The NCAA was founded in 1906 as a result of a conference called by President Theodore Roosevelt with representatives from thirteen colleges and universities in order to address the brutality of the sport of football and to reform the rules of college football.[9] The NCAA was primarily a discussion group and rules-making body, until 1921 when the association expanded its operations and conducted its first championship tournament.[10] With the growth and divergence in the number of college athletics programs, the NCAA, in 1973, divided its member institutions into three legislative and competitive divisions—I, II, and III.[11] As the NCAA organization evolved, so did its commercial endeavors, its presence in the media outlets, and commensurately its revenue stream.[12]

The NLOI program was established to bring order to what otherwise could be a free-for-all in the recruitment process.[13] A group of seven conferences in 1964 created the NLOI program to alleviate recruiting excesses that became common with "increased television exposure in the 1940s and 1950s."[14] To stop schools

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alone amounted to $638,980,000. *Id.* at 21. *See also* Orion Riggs, *The Facade of Amateurism: The Inequities of Major-College Athletics*, 5 KAN. J.L. & PUB. POL'Y 137, 138-40 (1996) (discussing the big business of college athletics).

[8] WONG, *supra* note 7, at 165. For a history of the regulatory and enforcement structure of the NCAA, see Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487, 490-93 (1995).

[9] The Intercollegiate Athletic Association of the United States was formed later in 1906 and "took its present name, the NCAA, in 1910." *History*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Who+We+Are/About+the+NCAA+history (last visited Nov. 1, 2011).

[10] *Id.* Eventually, more rules committees were formed and more championship series were created. *Id.*

[11] *Id.* "Five years later, Division I members voted to create subdivisions I-A and I-AA (renamed the Football Bowl Subdivision and the Football Championship Subdivision in 2007) in football." *Id.*

[12] Jeffrey J.R. Sundram, Comment, *The Downside of Success: How Increased Commercialism Could Cost the NCAA Its Biggest Antitrust Defense*, 85 TUL. L. REV. 543, 546-50 (2010).

[13] For an overview of the NCAA's regulation of recruiting, see 2 ROBERT C. BERRY & GLENN M. WONG, LAW AND BUSINESS OF THE SPORT INDUSTRIES § 1.41-.43 (1986).

[14] Michelle Brutlag Hosick, *History of the National Letter of Intent*, NCAA (Feb. 2, 2011 5:00 PM), http://www.ncaa.com/news/ncaa/2011-02-02/history-national-letter-intent.

from luring away football players after they had enrolled on other campuses, the group formed a plan to issue *letters of intent* "that would keep other conference coaches from recruiting a student-athlete once he declared his intent to participate at a specific school."[15] For a time, the documents were recognized only within a conference, but subsequently a voluntary inter-conference letter of intent program was developed by the Collegiate Commissioners Association (CCA), which subsequently initiated a *National* Letter of Intent to ensure that a student-athlete would attend an institution for one academic year in return for financial aid.[16] Today, the NCAA Eligibility Center, which handles most issues surrounding prospective student-athletes, administers the NLOI program.[17] Though the program was originally created to address issues with the recruitment of football student-athletes, all student-athletes recruited for any NCAA-sponsored sport now participate.[18]

The National Letter of Intent is a document issued by the CAA and subscribing NCAA-member institutions to prospective student-athletes in order to establish the commitment to attend a particular institution.[19] In actuality, the various conferences play a greater role in administering the program than the NCAA, although it might behoove the NCAA to exercise more oversight.[20] Currently, there are 620 participating Division I and Division II institutions and over 37,000 prospective student-athletes who sign a NLOI each year.[21] Once signed, if student-athletes wish to change schools, then they must participate in at least one practice in their sport or attend at least one class at their initially selected

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[15] *Id.*

[16] *Id.*

[17] The NCAA administers the NLOI program; however, only the CCA has the power to make changes to the program, which is still governed by the CCA through a group of four, five-member committees: NLOI Policy and Review Committee, Division I Appeals Committee, Division II Review Committee and Division II Appeals Committee. *Id.*

[18] *Id.*

[19] Gil Fried & Michael Hiller, *ADR in Youth and Intercollegiate Athletics*, 1997 BYU L. REV. 631, 643-44.

[20] Meyer, *supra* note 1, at 243-44.

[21] *Quick Reference Guide to the NLI*, NCAA 1-2, http://www.ncaa.org/wps/wcm/connect/85bbf0004e0dc6ec94fef41ad6fc8b25/NLI+Guide+201011.pdf?MOD=AJPERES&CACHEID=85bbf0004e0dc6ec94fef41ad6fc8b25 (last visited Nov. 1, 2011).

institution, sit out a year in their sport prior to enrolling at another institution, and complete a full-time academic program for a full year at the new institution before competing in their sport again.[22] Enrolling in another institution within one year of the execution of the agreement "results in intercollegiate ineligibility for two years, unless the initial institution formally releases the student."[23] In other words, "the *basic penalty* for not attending" the institution with which the student signed the NLOI agreement "for one academic year (two semesters or three quarters) is the loss of one season of competition in all sports and a required one academic year in residence at the next NLOI member institution before being able to represent another NLOI institution in intercollegiate athletics competition."[24]

If an institution chooses not to release a prospective student-athlete from the NLOI, the prospective student-athlete may appeal the institution's decision by submitting a NLOI Appeals Form to the NLOI office within thirty days after the institution denied the release request.[25] The institution will then have an opportunity to respond in writing to the student's appeal.[26] Following receipt of the institutional response, the NLOI committee (NLOI Policy and Review Committee for Division I institutions or the Division II Review Committee) will review the materials and render a decision.[27] This decision may be appealed to the NLOI Appeals Committee within thirty days of the date of the appeal decision letter, whose decision is final and binding on member institutions.[28] If the NLOI Appeals Committee upholds

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[22] Fried & Hiller, *supra* note 19, at 644.

[23] Leroy Pernell, *Drug Testing of Student Athletes: Some Contract and Tort Implications*, 67 DENV. U. L. REV. 279, 284 (1990) (discussing the NLOI as a contractual obligation). The Release Request form is available online. *National Letter of Intent Release Request Form*, NCAA 1-2, http://www.ncaa.org/wps/wcm/connect/6d4f0c80486cc85b9444b74c8af46e6f/Release%2BRequest%2BForm%2B911.pdf?MOD=AJPERES&CACHEID=6d4f0c80486cc85b9444b74c8af46e6f (last visited Nov. 1, 2011) [hereinafter *Release Request Form*].

[24] *Release Request Form*, *supra* note 23, at 1 (emphasis added).

[25] *National Letter of Intent Penalty Provisions & Appeals Process*, NCAA 1, http://www.ncaa.org/wps/wcm/connect/2f47b5004e0dc6de94eff41ad6fc8b25/Appeals+Process+Sheet+%2810.01.10%29.pdf?MOD=AJPERES&CACHEID=2f47b5004e0dc6de94eff41ad6fc8b25 (last visited Nov. 1, 2011).

[26] *Id.*

[27] *Id.*

[28] *Id.*

the decision in favor of an institution, the student-athlete may transfer to another institution, but will not be eligible to participate in intercollegiate athletics for one year. [29] Any institution that signs a player who was not properly released has violated the recruiting ban established under the NLOI program and would be subject to sanctions.[30]

The NLOI program also established specific signing periods for prospective student athletes, in both the fall and spring of a high school athlete's senior year.[31] Predictably, many student-athletes will not yet have reached their eighteenth birthday when they sign NLOI agreements on these prescribed dates. So assume the athlete changes his or her mind subsequent to signing the NLOI agreement. Assume also that the institution refuses to release the athlete, and the student-athlete loses his or her appeal of the institution's decision to the NLOI Committee. Could the student athlete, who is a minor, not simply disaffirm the contract?

II. CONTRACTUAL CAPACITY: THE MINOR'S COMMON LAW RIGHT TO DISAFFIRM

A. Overview

Contractual capacity is one of the requirements for a valid, enforceable contract.[32] A lack of contractual capacity makes the agreement voidable at the option of the person lacking capacity.[33]

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[29] *Id.* Last year, fewer than 700 prospective student-athletes, who signed a NLOI, requested releases. Of these, thirty did not obtain a release. Hosick, *supra* note 14.

[30] The NLOI acknowledges that all participating conferences and institutions are obligated to respect the agreement and cease recruiting of the signed athlete. *National Letter of Intent*, NCAA 1-3 (Oct. 1, 2008), http://sportsillustrated.cnn.com/2009_images/letterofintent.pdf.

[31] *Signing Dates*, NCAA, http://www.ncaa.org/wps/ wcm/connect/nli/nli (last visited Nov. 1, 2011).

[32] RESTATEMENT (SECOND) OF CONTRACTS § 12 (1981). For a summary of capacity as a contractual requirement and the common law rules applied to minors see 42 AM. JUR. 2D *Infants* §§ 39-136 (2010).

[33] Along with minors, persons who are mentally incompetent or intoxicated also lack contractual capacity. RESTATEMENT (SECOND) OF CONTRACTS §§ 15-16 (1981); *see* Hedgepeth v. Home Sav. & Loan Ass'n, 361 S.E.2d 888, 889-90 (N.C. Ct. App. 1987) (discussing the requirements for disaffirmance by mentally incompetent parties); *see also* First State Bank of Sinai v. Hyland, 399 N.W.2d 894, 896 (S.D. 1987) (discussing the circumstances under which a party can avoid a contract based on intoxication). Historically, married women also lacked capacity to take, hold, or convey property, a

The common law protects minors from the making of improvident contracts during their infancy by permitting them to rescind, or *disaffirm*, such contracts.[34] What is referred to as the *Infancy Doctrine* can be traced to the thirteenth century, while its basic concepts "have been in place since at least the fifteenth century."[35] This contractual defense permits minors to disaffirm otherwise binding agreements during their minority and for a reasonable time after they reach the age of majority, which is eighteen years old in most states.[36] Disaffirmance must be of the entire contract and not just an objectionable part.[37]

The obligation of the minor upon disaffirmance is to return the consideration the minor received in the transaction in order to receive the consideration the minor exchanged, such that the status quo ante is restored. [38] Typically, there are few complications if the power of avoidance is exercised at the executory stage, because there has been no exchange of consideration, only potentially non-recoupable reliance expenditures incurred by the competent party. However, if the consideration is damaged, destroyed, or consumed in some way, state law may impose a make-whole obligation, requiring payment

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restriction which was removed by state legislatures through the enactment of Married Women's Property Acts. Peddy v. Montgomery, 345 So. 2d 631, 633-34 (Ala. 1977).

[34] Mellott v. Sullivan Ford Sales, 236 A.2d 68, 70 (Me. 1967). Similar protection is afforded to minors by the civil law in Louisiana. Melvin John Dugas, *The Contractual Capacity of Minors: A Survey of the Prior Law and the New Articles*, 62 TUL. L. REV. 745 (1988) (discussing the Civilian Code and Louisiana law). For a discussion of the infancy doctrine and comparison of the law of the United States and England, see Simon Goodfellow, Note, *Who Gets the Better Deal?: A Comparison of the U.S. and English Infancy Doctrines*, 29 HASTINGS INT'L & COMP. L. REV. 135 (2005).

[35] Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 275, 290 (2006).

[36] RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981).

[37] CALAMARI & PERILLO, *supra* note 5, at § 8.4; *see also* Langstraat v. Midwest Mut. Ins. Co., 217 N.W.2d 570, 571 (Iowa 1974) (refusing to permit selective disaffirmance of provisions in a contract for insurance).

[38] Quality Motors, Inc. v. Hays, 225 S.W.2d 326, 328 (Ark. 1949) (stating the rule that a minor may disaffirm contracts by returning the consideration received as is available); *see also* Robertson v. King, 280 S.W.2d 402, 404 (Ark. 1955) (holding that the minor was entitled to recover the reasonable market value of the car at the time of purchase, since the consideration given by the minor was no longer available).

of depreciation or damages by the minor upon disaffirmance,[39] although many states require no more than that the minor return the consideration, if available, without consequence.[40]

If minors misrepresent their age, the requirements upon disaffirmance will also depend upon state law,[41] although the common law rule provided that falsely representing that one had capacity did not confer capacity.[42] Nevertheless, there is generally a greater obligation under state law to make restitution in cases of misrepresentation, and some states do not allow avoidance.[43]

B. Limitations

There are other common law and statutory restrictions on minors' ability to disaffirm contracts.[44] For example, the law in most states holds minors liable for the reasonable value of the consideration provided if the contract is for something that is *necessary* to maintain their station in life, in order to encourage

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[39] *See* Dodson v. Shrader, No. 89-128-II, 1989 Tenn. App. LEXIS 683, at *21 (Tenn. Ct. App. Oct. 20, 1989) (stating the rule that permits reasonable compensation for the use of the item, or for depreciation, or for willful or negligent damage by the minor).

[40] *See, e.g.*, Swalberg v. Hannegan, 883 P.2d 931, 932-33 (Utah Ct. App. 1994) (holding that state law does not require the minor to restore a plaintiff to his pre-contractual status); Halbman v. Lemke, 298 N.W.2d 562, 567 (Wis. 1980) (holding that a disaffirming minor need not make restitution).

[41] *See, e.g.*, Keser v. Chagnon, 410 P.2d 637, 639-41 (Colo. 1966) (concluding that while misrepresenting one's age does not destroy the right to disaffirm, damages incurred as a result of the false representation may be deducted); Doenges-Long Motors, Inc. v. Gillen, 328 P.2d 1077, 1081-82 (Colo. 1958) (allowing recovery for the damages that flowed from the misrepresentation); Haydocy Pontiac, Inc. v. Lee, 250 N.E.2d 898, 900 (Ohio Ct. App. 1969) (concluding that an infant who induces the contract through false representation may not disaffirm the contract without returning the consideration to the other party).

[42] Sims v. Everhardt, 102 U.S. 300, 313 (1880) ("[A] fraudulent representation of capacity cannot be an equivalent for actual capacity.").

[43] For example, a state statute may prohibit disaffirmance. KAN. STAT. ANN. § 38-103 (2009) (prohibiting disaffirmance when, because of the minor's own misrepresentations as to his majority or involvement in business as an adult, the other party had reason to believe the minor was capable of contracting); *see also* Myers v. Hurley Motor Co., 273 U.S. 18, 22, 26-27 (1926) (allowing a set-off for depreciation when the minor only appeared to be of age but made no affirmative misrepresentation). The Supreme Court stated, "The defense, in effect, is that the plaintiff was guilty of tortious conduct to the injury of the defendant in the transaction out of which his own cause of action arose. In such case it is well settled that the relief is by way of recoupment." *Myers*, 273 U.S. at 27.

[44] CALAMARI & PERILLO, *supra* note 5, at § 8.3.

parties to enter into such agreements without fear of the minor exercising their power of disaffirmance.[45] Therefore, for example, if the item purchased is deemed to be a necessary, the minor would either be liable for its reasonable value, or if allowed to disaffirm, for the reasonable value of its use and depreciation.[46] This caveat is codified in some states.[47]

Some states also specify, by statute, other types of contracts that minors cannot avoid.[48] In order to bring "certainty and finality" with respect to certain dealings, legislatures prohibited minors from avoiding some obligations,[49] such as contracts for insurance[50] and student educational loans.[51] Other state laws provide a process for court approval of minors' contracts, resulting in a valid contract, but with the interest of protecting minors from

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[45] *See, e.g.*, Marshall v. Hous. Auth., 866 F. Supp. 999, 1005 (W.D. Tex. 1994) (determining that "whether or not lodging is a necessary is a question of fact to be determined by the jury"); Young v. Weaver, 883 So. 2d 234, 240-41 (Ala. Civ. App. 2003) (holding that an apartment was not a necessity because the minor was able to return to her parents' home at any time); Schmidt v. Prince George's Hosp., 784 A.2d 1112, 1125 (Md. 2001) (finding the minor liable for necessary medical treatment associated with a car accident when parents diverted insurance proceeds); Cidis v. White, 336 N.Y.S.2d 362, 363 (Nassau Cnty. Dist. Ct. 1972) (determining that contact lenses are necessaries and requiring the minor to pay their fair value); Gastonia Pers. Corp. v. Rogers, 172 S.E.2d 19, 24-25 (N.C. 1970) (concluding that the services of an employment agency could constitute a necessary if reasonably required in order to enable the minor to provide for himself and his dependents).

[46] Rose v. Sheehan Buick, Inc., 204 So. 2d 903, 905 (Fla. Dist. Ct. App. 1967) (holding that a car was a necessary item for the minor to carry out his business).

[47] *See, e.g.*, IDAHO CODE ANN. § 32-104 (2011); MONT. CODE ANN. § 41-1-305 (2010); N.D. CENT. CODE § 14-10-12 (2010).

[48] 42 AM. JUR. 2D *Infants* § 46-56 (2010); *see, e.g.*, MO. REV. STAT. § 431.055 (2010) (allowing sixteen year olds, in certain circumstances, to contract for housing, employment, the purchase of an automobile, student loans, admission to high school or postsecondary school, medical care, establishing bank accounts, or services relating to being a victim of domestic or sexual violence). For a discussion of the relevance of such statutory exceptions to the NCAA NLOI program, see *infra* notes 107-23 and accompanying text.

[49] Cunningham, *supra* note 35, at 290; *see also* KY. REV. STAT. ANN. § 384.090 (West 2010) (enforcing contracts of infants executed to obtain benefits of federal law providing for the making or guaranty of loans to war veterans).

[50] *See, e.g.*, ARIZ. REV. STAT. ANN. § 20-1106 (2011) (allowing minors of at least fifteen years to contract for life or disability insurance); COLO. REV. STAT. § 10-4-104 (2010) (allowing minors sixteen years or older to contract for property or liability insurance); MASS. GEN. LAWS ANN. ch. 175, § 128 (West 2010) (permitting minors fifteen years and over to contract for life insurance).

[51] *See infra* notes 72-73 and accompanying text.

improvident transactions preserved.[52] While court approval of the contracts of minors makes them binding agreements, as does the approval of a contract by a court-appointed guardian, the approval of a minor's contract by a parent or other guardian usually will not alter the voidable nature of the agreement.[53] Minors may also seek court-sanctioned emancipation which would confer capacity to enter into contracts.[54]

Minors who reach the age of majority can ratify an agreement entered into during their minority, at which point the contract is no longer voidable.[55] Ratification consists of words or actions that indicate the minor chooses to be bound by a contract obligation entered into during minority.[56] For example, a person continuing to make payments on a credit sale after reaching the age of majority ratifies the agreement. A minor, of course, is incapable of ratifying an agreement during minority as such a purported ratification would result only in another voidable agreement.

Because minors may only enter into voidable contracts, which is a principle maintained under the Uniform Commercial Code,[57] often their parents will act as surety in order to motivate merchants to sell goods, such as cars, to their minor children. In such cases, if the minor exercises the power of avoidance, the parent would still be bound under the terms of the contract for the

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[52] *E.g.*, NEV. REV. STAT. ANN. § 609.550 (West 2010) (limiting minor's ability to dispute validity of contract approved by court).

[53] 42 AM. JUR. 2D *Infants* § 40 (2010); *see also* Parrent v. Midway Toyota, 626 P.2d 848, 850 (Mont. 1981) (holding that the minor was not bound even though a parent was present and approved without signing the agreement).

[54] *See, e.g.*, KAN. STAT. ANN. § 38-108 (2011) (allowing district courts the authority to confer upon minors the rights of majority concerning contracts, and both real and personal property); OKLA. STAT. tit. 10, § 91 (2010) (allowing district courts to authorize and empower persons under the age of eighteen years to transact business).

[55] CALAMARI & PERILLO, *supra* note 5, at § 8.4.

[56] *See, e.g.*, *In re* The Score Board, Inc., 238 B.R. 585, 593 (Bankr. D.N.J. 1999) (concluding that depositing a check in payment for the minor's performance after reaching majority age was conduct amounting to the ratification of a contract); Fletcher v. Marshall, 632 N.E.2d 1105, 1108 (Ill. App. Ct. 1994) (concluding that occupancy and payment of rent constituted an unequivocal ratification of a lease).

[57] Under the Uniform Commercial Code, a minor's contract with respect to the sale of goods is voidable. If the purchaser of a good from a minor subsequently sells that good to a good faith purchaser for value, that party no longer has a voidable title. Section 2-403(1) provides that "[a] person with voidable title has power to transfer a good title to a good faith purchaser for value." U.C.C. § 2-403(1) (1990).

remaining payments. In sum, although there are exceptions to the rule that minors lack the contractual capacity required to consummate valid contracts, it is probably true everywhere that the great bulk of infants' transactions are voidable.[58] Presumably, the same conclusion is applicable with respect to the NLOI.

III. ENFORCEABILITY OF LETTERS OF INTENT

The first inquiry, of course, must be whether or not the NLOI constitutes a contract between the minor and the educational institution.[59] The general consensus is that the letter indeed does constitute an agreement between those two parties, according to both courts[60] and commentators.[61] As such, it is subject to normal

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[58] CALAMARI & PERILLO, *supra* note 5, at § 8.3.

[59] Typically the consideration to support the letter of intent is the athlete's commitment in exchange for a full scholarship; however, as long as financial aid is promised by the institution, the NLOI agreement is binding as per NCAA rules. *NLI Provisions: Financial Aid Requirement*, NCAA, http://www.ncaa.org/wps/wcm/connect/nli/nli/nli+provisions/financial+aid (last visited Nov. 1, 2011).

[60] "The NLI is a contract which imposes obligations upon a prospective student-athlete and the university who executes it." Knapp v. Nw. Univ., No. 95 C 6454, 1996 U.S. Dist. LEXIS 12463, at *2 (N.D. Ill. Aug. 23, 1996), *rev'd on other grounds*, 101 F.3d 473 (7th Cir. 1996); *see also* Pryor v. NCAA, 153 F. Supp. 2d 710, 717 (E.D. Pa. 2001) (referring in dicta to the NLOI as a contract with conditions); Treadwell v. St. Joseph High Sch., No. 98 C 4906, 1999 U.S. Dist. LEXIS 14733, at *17-18 (N.D. Ill. Sept. 13, 1999) (referring in dicta to the NLOI as a contract); Taylor v. Wake Forest Univ., 191 S.E.2d 379, 382 (N.C. Ct. App. 1972) (holding that the relationship between a student-athlete and the university was contractual in nature); O'Brien v. Ohio St. Univ., No. 06AP-946, 2007 Ohio App. LEXIS 4316, at *19 n.6 (Ohio Ct. App. Sept. 20, 2007) (stating that the NLOI acts as a contract between a school and a prospective student-athlete, giving notice to all other schools of the athlete's commitment to the school designated in the NLOI); Barile v. Univ. of Va., 441 N.E.2d 608, 615 (Ohio Ct. App. 1981) (stating that the conclusion that the relationship between a student and a college is contractual in nature is particularly applicable to college athletes who contract by financial aid or scholarship agreement to attend college and participate in intercollegiate athletics). While the NLOI and its attending circumstances may constitute a contractual obligation, oral assurances of a position on an intercollegiate team may not be sufficient evidence of a contract. Giuliani v. Duke Univ., No. 1:08CV502, 2009 U.S. Dist. LEXIS 44412, at *6-11 (M.D.N.C. May 19, 2009).

[61] Michael J. Cozzillio, *The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name*, 35 WAYNE L. REV. 1275, 1283-84 (1989); Kevin Stangel, Comment, *Protecting Universities' Economic Interests: Holding Student-Athletes and Coaches Accountable for Willful Violations of NCAA Rules*, 11 MARQ. SPORTS L. REV. 137, 140-47 (2000); *see also* Derek Quinn Johnson, Note, *Educating Misguided Student Athletes: An Application of Contract Theory*, 85 COLUM. L. REV. 96, 114-17 (1985) (asserting that "the financial aid statement, the letter of intent, the

contract law principles such as the satisfaction of express conditions, for example.[62] However, while the NLOI agreement is between the member universities and the athlete, the penalty for breaching the agreement, i.e., the rule that the student athlete be precluded from participating at another member institution for a period of time,[63] is enforced by the NCAA's NLOI program, which is not a party to the agreement. Is this fact significant?

In *Oliver v. NCAA*[64] the court acknowledged as obvious the absence of a contractual relationship between the student-athlete and the NCAA, characterizing it as "an unincorporated association consisting of public and private universities and colleges" that "adopts rules governing member institutions' recruiting, admissions, academic eligibility, and financial-aid standards for student athletes."[65] Nevertheless, it did view the student athlete's relationship to the NCAA as that of a third-party beneficiary, stating that it was "unquestionable" that the contractual relationship between the NCAA and its member institutions was created to confer a benefit on student-athletes.[66] As a result, it concluded that any arbitrary and capricious action by the NCAA would violate the duty of good faith and fair dealing that is implied in the contractual relationship between the NCAA and its members, affording the student-athlete, as a third-party beneficiary of that contractual relationship, standing to sue.[67]

Similarly, the sanctions imposed by the NCAA against schools which would seek to sign minors who disaffirm a NLOI, as well as against minors who exercise that right and are effectively

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university bulletin, the general catalogue, and the various brochures and pamphlets, as well as the negotiations between the parties," manifest the existence of a contract); Fried & Hiller, *supra* note 19, at 643-44; Pernell, *supra* note 23, at 284; Riella, *supra* note 1, at 2193-96.

[62] For example, the NLOI may be predicated on the achievement by the student-athlete of a satisfactory grade point average or college admission test score. *Pryor*, 153 F. Supp. 2d at 718; Hall v. NCAA, 985 F. Supp. 782, 785-87 (N.D. Ill. 1997).

[63] *See supra* notes 22-24 and accompanying text.

[64] 920 N.E.2d 203 (Ohio Ct. Com. Pl. 2009).

[65] *Id.* at 210-11.

[66] *Id.* at 211.

[67] *Id.* at 212. The judgment was later vacated by the settlement in the case. For a discussion of the case and its potential ramifications, see Richard G. Johnson, *Submarining Due Process: How the NCAA Uses Its Restitution Rule to Deprive College Athletes of Their Right of Access to the Courts . . . Until* Oliver v. NCAA, 11 FLA. COASTAL L. REV. 459 (2010).

prevented from competing in intercollegiate athletics for a period of time, also are arbitrary and capricious and a breach of the duty of good faith and fair dealing arguably inherent in the contract between the NCAA's NLOI program and its member schools. As a result, the same argument made in *Oliver* should apply to allow the student-athlete as a third-party beneficiary to hold the NCAA liable for enforcing a rule that strips the minor of his right to disaffirm an agreement.[68] So at first blush, it seems that the NLOI is a voidable contract between the university and the student-athlete. Moreover, it seems that the NLOI program rules and agreement, which purportedly ban member institutions from signing an athlete who rightfully exercises that right to disaffirm, are contrary to public policy, and that such an argument could be raised successfully by the athlete as a third-party beneficiary. Nevertheless, several arguments grounded in the contract law previously discussed,[69] emerge which potentially could be used to find a legal commitment in letters of intent.

A. Education as a Necessary?

As previously mentioned, minors are liable for the reasonable value of their necessaries.[70] Is education deemed to be a necessary, so that a minor-athlete, who receives a college education in exchange for the promise to play exclusively for the institution, would be bound to the agreement? While a certain level of education may be considered necessary under common law precedent, typically a college education is not considered to be a necessary.[71] Nevertheless, educational loans are enforceable by statute in some jurisdictions, such as those which have adopted the *Model Minor Students Capacity to Borrow Act*[72] or a similar

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[68] *See also* Bloom v. NCAA, 93 P.3d 621, 624 (Colo. App. 2004) (holding that a student-athlete had third-party beneficiary status to pursue a claim).

[69] *See supra* notes 32-58 and accompanying text.

[70] *See supra* notes 44-47 and accompanying text.

[71] 42 AM. JUR. 2D *Infants* § 69 (2010). "Under present day conditions, as in the past, a college education is not, as matter of law, a necessary, though very likely circumstances could be shown which would warrant that conclusion as matter of fact." Moskow v. Marshall, 171 N.E. 477, 479 (Mass. 1930) (citation omitted).

[72] Under the Model Minor Student Capacity to Borrow Act, any written obligation signed by a minor sixteen years old or older

law.[73] Even if an argument could be made effectively that in today's society a college education is reasonably necessary to maintain one's station in life, there are other means of securing financial support than through an athletic scholarship.[74]

B. Parental Approval?

Is the fact that the parent or guardian signed the NLOI of legal significance? Assuming that the parent or guardian is not court-appointed to transact business on behalf of the minor,[75] the approval of the agreement by the parent should bear no significance on the otherwise voidable agreement.[76] To hold otherwise installs parents as de facto agents:

> in consideration of an educational loan received by the minor from any person is enforceable as if the minor was an adult at the time of execution, but only if prior to the making of the educational loan an educational institution has certified in writing to the person making the educational loan that the minor is enrolled, or has been accepted for enrollment, in the educational institution.

N.D. CENT. CODE § 14-10.2-02 (2011). The act has also been adopted by Arizona. ARIZ. REV. STAT. § 44-140.01 (LexisNexis 2011).

[73] *See, e.g.*, ALASKA STAT. § 14.43.140 (2011) (enforcing a written obligation entered into by sixteen-year-old minor "for the purpose of furthering the minor's education in a career program or an institution of higher learning"); GA. CODE ANN. § 13-3-23 (2011) (providing that contracts, notes, or other evidence of indebtedness "executed by a minor for a loan from any trust fund for educational purposes to any educational institution shall be valid and binding"); MO. REV. STAT. § 431.067 (2010) (permitting minors to "contract to borrow money to defray the necessary expenses of attending any accredited university, college, or conservatory"); N.J. STAT. ANN. § 18A:71C-9 (2011) (making educational loans executed by minors valid); N.C. GEN. STAT. § 116-174.1 (2010) (granting minors of seventeen years the authority to execute loans for obtaining a secondary education); WASH. REV. CODE ANN. § 26.30.020 (West 2011) (making written obligation signed by a minor sixteen years old or older for educational loans enforceable).

[74] For example, Federal Student Aid delivered approximately $100 billion in financial aid to almost eleven million students and families in 2008. *U.S. Department of Education Expands Its Student Loan Servicing Capacity*, U.S. DEPT. EDUC. (June 17, 2009), http://www.ed.gov/news/press-releases/us-department-education-expands-its-student-loan-servicing-capacity.

[75] Additionally, some statutes may permit parental consent to bind the minor with respect to specific agreements. *See* IND. CODE ANN. § 22-3-2-15(c) (West 2011) (providing that a minor dependent, by parent or legal guardian, may compromise worker's compensation disputes and may enter into a compromise settlement upon approval by a member of the worker's compensation board).

[76] At common law, an infant could disaffirm his written consent as well as a consent executed by another on his or her behalf. Shields v. Gross, 448 N.E.2d 108, 110

> The selection of a proper agent requires the exercise of as much discretion as the making of a contract. To bind an infant by the act of an agent, when he would not be bound if the act were done by himself, is to allow him to be overreached indirectly, and so do away with the safeguards provided by law for his protection.[77]

For example, in *NYC Management Group, Inc. v. Brown-Miller*, a minor signed a standard contract which stated the performance required of her as a model.[78] Her mother signed the agreement as well, indicating "her assent to her daughter's entry into the agreement without assuming any obligation of her own."[79] The court noted that "[s]uch indications of parental approval are not enough to override the right of the child to disaffirm her own contracts."[80] Similarly, the parent's assent to the NLOI is not sufficient to override the minor's right to disaffirm.

Parents, however, can become co-signors of obligations as a surety, which does not obligate the minor to perform, but rather acts as insurance against the minor's *non*-performance. Typically, in a surety arrangement, if the minor defaults, the parents must perform the contract. That solution is not available with respect to the NLOI program, as the parent signing for the minor would not be asked to step in and play.[81] In fact, specific performance by the

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(N.Y. 1983) (citing cases); *see also* Schmidgall v. Engelke, 224 N.E.2d 590, 590 (Ill. App. Ct. 1967) ("Minor's right to disaffirm his contract is not affected by parental approval, and a parent by his relationship to minor is without authority to enter into contracts binding on a minor."); Hogue v. Wilkinson, 291 S.W.2d 750, 755 (Tex. Civ. App. 1956) (stating that "[e]ven if the mother and grandfather had signed the written contracts as agents of the minor plaintiff, such contracts would not have bound the minor if he wished to disaffirm"); Bombardier v. Goodrich, 110 A. 11, 11 (Vt. 1920) ("The assent of the father adds nothing to the binding force of an infant's promise."); Hines v. Cheshire, 219 P.2d 100, 104 (Wash. 1950) ("[T]he law seems to be settled that an infant is not precluded from disaffirming by reason of the fact that an adult joined with him in signing the contract.").

[77] Vogelsang v. Null, 3 S.W. 451, 452 (Tex. 1887).

[78] No. 03 Civ. 2617 (RJH), 2004 U.S. Dist. LEXIS 8652 (S.D.N.Y. May 14, 2004).

[79] *Id.* at *16.

[80] *Id.*; *see also* Berg v. Traylor, 56 Cal. Rptr. 3d 140, 147-48 (Cal. Ct. App. 2007) (allowing a minor to disaffirm a contract to secure personal management services for the purpose of advancing the minor's acting career, even though his mother co-signed the agreement).

[81] "Still, the unique problem with the NLOI is that the cosigner is the student-athlete's parent or guardian. The cosigner cannot give the university what it wants—the athletic services of the minor student-athlete. Thus, enforcing the

minor of the agreement would not be enforced against the party to the NLOI if the athlete were not a minor either, as the order to perform a contract involving personal services is usually unavailable as a remedy for breach of contract.[82] Since the parents of a student-athlete can in no way be a secondary obligor should the minor fail to perform, the requirement of a parent's signature is misleading at best, and has a chilling effect on the minor's common law right to disaffirm.[83]

Further, whereas a court-appointed guardian owes a fiduciary duty to the minor or otherwise incompetent party as a representative in legal proceedings,[84] no fiduciary relationship to exercise care in transacting business arises simply by virtue of the parental relationship. As a result, there is no legal guarantee that the best interests of the child will be served with parental approval alone, or that a remedy will exist for any failure to adhere to a fiduciary standard of care in transacting business on behalf of the minor. In fact, the doctrine of familial immunity could preclude any recourse by the minor against the parent who acted negligently and in contrast to the minor's best interests.[85]

Moreover, it is a distinct possibility that the interests of the parents and the minor could diverge in selecting an institute of higher education, and that some over-reaching by the parent could occur in the selection process. For example, the mother of a

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agreement through the cosigner is of negligible utility to the university." Cozzillio, *supra* note 61, at 1327.

[82] *See* Tamarind Lithography Workshop, Inc. v. Sanders, Civ. No. 66492, 1983 Cal. App. LEXIS 1788, at *14-15 (Ct. App. Apr. 28, 1983) (stating the general rule that the specific performance, as a remedy, is only available when damages at law are inadequate); *see also* Felch v. Findlay Coll., 200 N.E.2d 353, 355 (Ohio Ct. App. 1963) (concluding that equity will not grant specific performance of affirmative promises in a personal service contract).

[83] *But see* Cozzillio, *supra* note 61, at 1326. Professor Cozzillio claims that the NLOI intercepted potential problems in the student-athlete's lack of capacity by requiring a co-signature by the parent or guardian. "This requirement allows the Letter of Intent to exist as a viable agreement . . . ." *Id.*

[84] 42 AM. JUR. 2D *Infants* § 160 (2010).

[85] For a discussion of tort immunity among family members, see Brenda K. Harmon, Note, *Parent-Child Tort Immunity: The Supreme Court of Illinois Finally Gives This Doctrine the Attention It's Been Demanding:* Cates v. Cates, *156 Ill. 2d 76, 619 N.E.2d 715 (1993)*, 19 S. ILL. U. L.J. 633 (1995). Waivers of immunity are usually found only in unique circumstances that overcome the policy behind such immunity, that is, the peace of the home. *See, e.g.*, Henderson v. Woolley, 644 A.2d 1303, 1308-09 (Conn. 1994) (permitting lawsuit for sexual abuse).

prospective athlete recently forged his letter of intent, mistakenly signing with a university for which the athlete had chosen not to play.[86] The alleged activities of Heisman Trophy winner Cam Newton's father also suggest that inappropriate requests for the services of his son were made to intercollegiate athletic programs.[87] Furthermore, under current NCAA restrictions, an agent cannot represent minor-athletes.[88] If the minor could be represented by an agent, then at least a cause of action could be allowed against the agent for a failure to act in the minor's best interests and to exercise care.[89]

Granted, if the NLOI contained a liquidated damages clause in the event of the minor's breach, then the feasibility of a parent serving as a guarantor of that obligation by paying the agreed-upon damages is more realistic. But even that type of arrangement still might be questionable since it could be viewed as being tantamount to imposing a penalty for minor athletes exercising their common law right to disaffirm.[90] If the liquidated damages clause was limited to the reliance expenses incurred in recruiting the student-athlete or to scholarship monies committed and effectively lost if the student disaffirms, then it arguably

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[86] *Recruit Confirms Mom Forged Signature*, ESPN.COM (Feb. 3, 2011 1:39 PM), http://sports.espn.go.com/ncaa/recruiting/football/news/story?id=6084711.

[87] It was reported that the athlete's father told university officials that schools recruiting the quarterback would have to come up with money beyond a scholarship to secure his services. Thayer Evans, *Report: Newton, Father Sought Money*, FOX SPORTS (Nov 11, 2010 2:08 PM), http://msn.foxsports.com/collegefootball/story/report-auburn-qb-and-father-sought-money-from-colleges-110910.

[88] Richard T. Karcher, *The NCAA's Regulations Related to the Use of Agents in the Sport of Baseball: Are the Rules Detrimental to the Best Interest of the Amateur Athlete?*, 7 VAND. J. ENT. L. & PRAC. 215, 216 (2005); *see also* T. Matthew Lockhart, Comment, Oliver v. NCAA*: Throwing a Contractual Curveball at the NCAA's "Veil of Amateurism*," 35 U. DAYTON L. REV. 175 (2010) (discussing a case challenging the NCAA's no-agency rules); Brandon D. Morgan, Oliver v. NCAA*: NCAA's No Agent Rule Called Out, but Remains Safe*, 17 SPORTS L.J. 303, 312-16 (2010) (arguing that having proper representation does not make the student-athlete a professional).

[89] "An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship." RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006).

[90] Damages may be liquidated in the agreement at an amount that is "reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss." RESTATEMENT (SECOND) OF CONTRACTS § 356 (1981). A contract provision that sets an unreasonably large sum of liquidated damages is "unenforceable on grounds of public policy as a penalty." *Id.*

could be enforced.[91] But reimbursement and recoupment are not what the NCAA member schools desire as part of the bargaining process. The *basic penalty* instead is designed to act as a deterrent to allowing a minor to change their mind—a recognized right the common law permits.

C. Employment Contracts?

What about contracts associated with the minor's employment? Some states will recognize the liability of a minor with respect to contracts associated with a business operated by the minor.[92] Generally, however, contracts for the provision of labor or services are voidable at the election of the minor.[93] Student-athletes are not viewed as employees under most state laws with respect to workers' compensation statutes,[94] so it is

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[91] Typically under contract law liquidated damages that are designed to penalize a breaching party rather than to protect the expectation interests of an innocent party are unenforceable. *See, e.g.*, Cal. & Haw. Sugar Co. v. Sun Ship, Inc., 794 F.2d 1433, 1436 (9th Cir. 1986) (determining that the liquidated damages agreed upon were reasonable in light of the anticipated harm); Mason v. Fakhimi, 865 P.2d 333, 335-36 (Nev. 1993) (upholding a liquidated damage clause as being valid and not a penalty when actual monetary harm was less); City of Rye v. Pub. Serv. Mut. Ins. Co., 315 N.E.2d 458, 459 (N.Y. 1974) (concluding that a liquidated damages provision was a penalty provision since the harm for which it was designed to compensate was minimal and speculative); Watson v. Ingram, 851 P.2d 761, 764 (Wash. Ct. App. 1993) (stating the general rule that liquidated damages clauses must be a reasonable forecast of just compensation for the harm that is caused by the breach).

[92] Juanda Lowder Daniel, *Virtually Mature: Examining the Policy of Minors' Incapacity to Contract Through the Cyberscope*, 43 GONZ. L. REV. 239, 247-48 (2007) (arguing that the cognitive ability of minors counsels in favor of greater accountability); Larry A. DiMatteo, *Deconstructing the Myth of the "Infancy Law Doctrine": From Incapacity to Accountability*, 21 OHIO N.U. L. REV. 481, 511-14 (1995) (arguing for greater accountability for minors). A state statute could recognize such liability. *See* GA. CODE ANN. § 13-3-21 (2011) (providing that if "a minor, by permission of his parent or guardian or by permission of law, practices any profession or trade or engages in any business as an adult, he shall be bound for all contracts connected with such profession, trade, or business"); *see also* Pankas v. Bell, 198 A.2d 312, 315 (Pa. 1964) (enforcing a minor's restrictive covenant in an employment contract).

[93] 42 AM. JUR. 2D *Infants* §§ 54-56 (2010).

[94] Michael J. Mondello & Joseph Beckham, *Workers' Compensation and Collegiate Athletes: The Debate Over the Pay for Play Model: A Counterpoint*, 31 J.L. & EDUC. 293, 295-99 (2002) (discussing case law).

unlikely that their relationship to the university would be viewed as one of employment anyway.[95]

Moreover, the agreement itself acts similarly to restrictive covenants in employment contracts. A similar argument has been made with respect to the NCAA's anti-transfer rules, by which students who transfer are required to satisfy a one-year residency rule.[96] The failure to comply with the letter of intent produces the same result. If the agreement is breached, the student athlete is precluded from playing for another school for a year.[97] Restrictive covenants are often viewed with disdain by courts because they restrict the ability of parties to the contract to earn a living,[98] and they are often examined for legality on reasonableness grounds.[99] Some states provide, by statute, additional criteria for examining the enforceability of covenants not to compete, as well.[100] The fact that the NLOI agreement resembles a restrictive covenant in an employment contract, if anything, strengthens the argument that

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[95] *But see* Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71 (2006) (concluding that NCAA athletes in Division I meet both the common law and statutory standards for classification as employees under the National Labor Relations Act); Nathan McCoy & Kerry Knox, Comment, *Flexing Union Muscle—Is It the Right Game Plan for Revenue Generating Student-Athletes in their Contest for Benefits Reform with the NCAA?*, 69 TENN. L. REV. 1051, 1065 (2002) (concluding that the National Labor Relations Board should recognize student-athletes as university employees with rights enumerated under the National Labor Relations Act).

[96] Ray Yasser & Clay Fees, *Attacking the NCAA's Anti-Transfer Rules as Covenants Not to Compete*, 15 SETON HALL J. SPORTS & ENT. L. 221, 233-50 (2005).

[97] *See supra* notes 22-24 and accompanying text.

[98] *See, e.g.*, Bellsouth Corp. v. Forsee, 595 S.E.2d 99, 105 (Ga. Ct. App. 2004) (affirming that the restrictive covenant must specify with particularity the nature of the business activities to be restrained); VisionAIR, Inc. v. James, 606 S.E.2d 359, 362 (N.C. Ct. App. 2004) (reiterating that covenants not to compete between an employer and an employee are not viewed favorably).

[99] *See, e.g.*, Borden, Inc., v. Smith, 478 S.W.2d 744, 747 (Ark. 1972) (refusing to enforce an overly broad restrictive covenant or to enforce the covenant to the extent that would be reasonable); Stultz v. Safety & Compliance Mgmt., Inc., 648 S.E.2d 129, 131 (Ga. Ct. App. 2007) (applying a three-element test of duration, territorial coverage, and scope of activity for examining reasonableness); Am. Sec. Servs., Inc., v. Vodra, 385 N.W.2d 73, 80 (Neb. 1986) (finding a three-year restraint to protect the goodwill of the employer was not unreasonable); Okuma Am. Corp. v. Bowers, 638 S.E.2d 617, 620 (N.C. Ct. App. 2007) (listing six factors to consider to examine the reasonableness of a restrictive covenant).

[100] *See, e.g.*, A.E.P. Indus., Inc. v. McClure, 302 S.E.2d 754, 760 (N.C. 1983) (requiring an agreement not to compete to be in writing and ancillary to an employment contract).

the agreement should be voidable to protect the minor student-athlete.

Further, the *basic penalty* of the NLOI agreement is indeed somewhat punitive in nature.[101] Punitive damages are disfavored in contract law, absent a public policy justification.[102] The most glaring public policy argument in this situation is that of protecting the minor from such a one-sided agreement. While the NLOI program clearly benefits member schools by ordering the process and making recruitment and retention of athletes more predictable, it is not readily apparent that the student-athlete necessarily benefits from those goals, nor that the program was instituted with the protection of the student-athlete in mind.

Courts are reluctant to intervene in the internal affairs of the NCAA as a voluntary association,[103] and pay deference to their internal governance regulations, subjecting them to an arbitrary and capriciousness standard.[104] However, if the NLOI program sanctioned a member for signing a minor-athlete who had repudiated his or her letter of intent, such an action in effect would be tantamount to enforcing the agreement in contravention of the minor's right to disaffirm—arguably an arbitrary and capricious action without apparent justification that properly considers what is in the best interest of the minor.[105] As a result,

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[101] *See supra* notes 22-24 and accompanying text (discussing the provisions of the basic penalty).

[102] "Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages is recoverable." RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981).

[103] *See, e.g.*, Tanaka v. Univ. of So. Cal., 252 F.3d 1059, 1063-64 (9th Cir. 2001) (upholding transfer rules against an antitrust challenge); NCAA v. Yeo, 171 S.W.3d 863, 869-70 (Tex. 2005) (upholding transfer rules against a constitutional challenge); *see also* Joel Eckert, Note, *Student-Athlete Contract Rights in the Aftermath of* Bloom v. NCAA, 59 VAND. L. REV. 905, 913 (2006) (discussing the arbitrary and capricious standard of review of NCAA actions). Although it can be argued that there is little choice but to become a member, no court has held that the association is not voluntary. Doug Bakker, *NCAA Initial Eligibility Requirements: The Case Law Behind The Changes*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 160, 162-64 (2006).

[104] *See* Cole v. NCAA, 120 F. Supp. 2d 1060, 1071-72 (N.D. Ga. 2000); NCAA v. Lasege, 53 S.W.3d 77, 83-87 (Ky. 2001). *But see* Oliver v. NCAA, 920 N.E.2d 203, 214 (Ohio Ct. Com. Pl. 2009) (finding the NCAA's "No Agent Rule" to be arbitrary and capricious).

[105] *See, e.g.*, Sheldon Elliot Steinbach, NCAA v. Lasege *and Judicial Intervention in Educational Decisions: The Kentucky Supreme Court Shoots an Air Ball for Kentucky*

it is unlikely that such an action, though seemingly only involving actions against a member, would be a candidate for deferential treatment by the judiciary.[106]

D. Statutory Exceptions for Minors in the Sport and Entertainment Industry

Given the prevalence of minor professional athletes and entertainers, some states have enacted specific statutes that recognize the validity of such contracts for professional services, provided the statutory requirements are met.[107] Legislatures enacted these statutes based on the common law principle that an infant could disaffirm agreements executed by themselves, as well as those executed by another on their behalf.[108] Many of these statutes establish a detailed procedure for court approval of the contract so that the adult party can be assured of a binding obligation.[109] For example, California's "Coogan" law (named for 1920s child star Jackie Coogan), which covers minors who are to render artistic or creative services, either directly or through a third party, allows for court approval of their contracts, and permits courts to establish trust funds for their earnings.[110] An

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Higher Education, 90 KY. L.J. 329, 344 (2002) (arguing that voluntary associations in higher education should be free to maintain standards when doing so violates no law).

[106] *See* Gordon E. Gouveia, *Making a Mountain Out of a Mogul:* Jeremy Bloom v. NCAA *and Unjustified Denial of Compensation Under NCAA Amateurism Rules*, 6 VAND. J. ENT. L. & PRAC. 22, 32 (2003) (arguing that inequity of NCAA rules coupled with the NCAA's inflexibility should prompt student-athletes to seek redress in courts and state legislatures).

[107] For a discussion of state regulation of the entertainment industry and participants who are minors, see Ben Davis, *A Matter of Trust for Rising Stars: Protecting Minors' Earnings in California and New York*, 27 J. JUV. L. 69 (2006); Heather Hruby, Comment, *That's Show Business Kid: An Overview of Contract Law in the Entertainment Industry*, 27 J. JUV. L. 47 (2006); and Jessica Krieg, Comment, *There's No Business Like Show Business: Child Entertainers and the Law*, 6 U. PA. J. LAB. & EMP. L. 429 (2004).

[108] Shields v. Gross, 448 N.E.2d 108, 110-12 (N.Y. 1983).

[109] 42 AM. JUR. 2D *Infants* § 55 (2010). Other state statutes allow for court approval of other types on contracts as well. *See, e.g.*, D.C. CODE § 21-146 (2011) (allowing court approval of joint contract between minor and adult party for the sale of real estate).

[110] CAL. FAM. CODE §§ 6750-53 (2010). For a critical analysis of the law and its subsequent amendments, see Peter M. Christiano, *Saving Shirley Temple: An Attempt to Secure Financial Futures for Child Performers*, 31 MCGEORGE L. REV. 201 (2000); Shayne J. Heller, Legislative Updates, *The Price of Celebrity: When a Child's Star-Studded Career Amounts to Nothing*, 10 DEPAUL-LCA J. ART & ENT. L. & POL'Y 161

Illinois statute also allows for court approval of a contract for minors to render artistic or creative services, [111] while a Massachusetts law provides for court approval of entertainment contracts for performances by minors, including modeling. [112] Other statutes allow for court approval of contracts between minors and talent agencies.[113]

Most state contract and labor laws focus on children who pursue careers in the entertainment industry rather than child athletes. [114] However, some state statutes cover both entertainment contracts as well as agreements relating to sports. New York law provides for judicial approval of the contract if the "infant is to perform or render services as an actor, actress, dancer, musician, vocalist or other performing artist, or as a participant or player in *professional* sports . . . ."[115] Florida law also provides for court approval of contracts by minors to perform or render artistic or creative services, or services "as a participant or player in *professional athletics or semiprofessional athletics*."[116] Texas law allows a court, upon petition of the guardian of the estate of the minor, to enter an order approving "an arts and entertainment contract, advertisement contract, or *sports* contract that is entered into by a minor," without specifying that the contract be for professional services. [117] The North Carolina statute, which was at issue in the case discussed in the

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(1999); and Thom Hardin, Note, *The Regulation of Minors' Entertainment Contracts: Effective California Law or Hollywood Grandeur?*, 19 J. JUV. L. 376 (1998). *See also* Davis, *supra* note 107, at 70-76; Krieg, *supra* note 107, at 433-38.

[111] 820 ILL. COMP. STAT. ANN. 20/1 (West 2011).

[112] MASS. GEN. LAWS ANN. ch. 231, § 85P1/2 (West 2010).

[113] *E.g.*, CAL. LAB. CODE § 1700.37 (West 2010); N.C. GEN. STAT. §§ 48A-17, -18 (2010).

[114] *See* Erica Siegel, Note, *When Parental Interference Goes Too Far: The Need for Adequate Protection of Child Entertainers and Athletes*, 18 CARDOZO ARTS & ENT L.J. 427 (2000) (arguing for a federal law to protect child super-athletes).

[115] N.Y. ARTS & CULT. AFF. LAW § 35.03(1) (McKinney 2011) (emphasis added). For a discussion of the New York law, see Davis, *supra* note 107, at 76-79, and Krieg, *supra* note 107, at 440-42.

[116] FLA. STAT. ANN. § 743.08(1)(a)-(b) (West 2010) (emphasis added). For a discussion of the Florida law, see Stephen M. Carlisle & Richard C. Wolfe, *Florida's New Child Performer and Athlete Protection Act: Or What to Do When Your Client Is a Child, Not Just Acting Like One*, 69 FLA. B.J. 93 (1995). *See also* Krieg, *supra* note 107, at 438-40.

[117] TEX. ESTATES CODE § 903 (2010) (emphasis added) (taking effect in 2014).

introduction,[118] provides for court approval of a "contract pursuant to which a person is employed or agrees to render services as a participant or player in a sport,"[119] as well as for financial safeguards[120] and the establishment of a trust.[121]

It would seem, however, that few, if any, of these statutes contemplate participation in intercollegiate athletics, as most address some sort of payment structure coupled with a financial interest to protect. Therefore, it is likely that these statutes providing for court approval of contracts for the services of child performers are neither relevant nor applicable to collegiate participation.[122] Moreover, an expansive reading of these statutes to include non-professional athletes is ill-advised since statutes that are in derogation of the common law should be construed strictly.[123]

Certainly in practice, court approval of NLOI agreements has not been sought. Seeking court approval of the thousands of NLOI agreements likely would not be feasible anyway, and if sought, such approval would likely be perfunctory at best, since the continuing need to ensure protection of the minor's financial estate is not necessary in amateur athletics. More significantly, minors do not need the defense that the NLOI was not court-approved in those states with a statute that arguably covers student-athletes. Student-athletes, who are minors when they sign, remain free to disaffirm their NLOI agreements anyway, not only before they reach the age of majority, but also for a reasonable time thereafter, provided they do not perform some act inconsistent with the intent to exercise the power of avoidance, such as participating in practices or otherwise indicating unequivocally their intent to be bound after reaching their eighteenth birthday.

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[118] *See supra* notes 2-4 and accompanying text.

[119] N.C. GEN. STAT. § 48A-11(3) (2010).

[120] *Id.* §§ 48A-14, -15.

[121] *Id.* § 48A-16.

[122] *But see* Cozzillio, *supra* note 61, at 1328 (asserting that the NLOI could be covered with "broad legislation that prohibits disaffirmance by infant athletes and entertainers").

[123] Shields v. Gross, 448 N.E.2d 108, 111 (N.Y. 1983).

IV. IMPLICATIONS GOING FORWARD

A. Policy Considerations

Arguably there is a need for higher standards of fairness in relationships between the NCAA and student-athletes, and NCAA rules fail to separate the interests of student-athletes from the interests of their universities.[124] "Comparable bargaining power does not exist at the core of the student-athlete/university relationship."[125] That observation can be extended to the athletic scholarship and how it structures the relationship between the NCAA, the university, and the student-athlete, limiting the term to renewable annual contracts, at the option of the university.[126] "As it exists today, the athletic scholarship contract is an unconscionable contract of adhesion, inconsistent with the important NCAA principles of student-athlete welfare and amateurism."[127]

Further, it is questionable whether or not the educational pursuit is indeed less important than the exploitation of the young person's athletic ability for financial gain.[128] A 1995 study of the decisional structures of the NCAA revealed seven characteristics that cast a degree of doubt upon whether or not the process accurately promotes the notion that one's status as a student

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[124] Brian L. Porto, Note, *Balancing Due Process and Academic Integrity in Intercollegiate Athletics: The Scholarship Athlete's Limited Property Interest in Eligibility*, 62 IND. L.J. 1151, 1169-73 (1987).

[125] Timothy Davis, *College Athletics: Testing the Boundaries of Contract and Tort*, 29 U.C. DAVIS L. REV. 971, 1016 (1996).

[126] *See* Daniel Nestel, Note, *Athletic Scholarships: An Imbalance of Power Between the University and the Student-Athlete*, 53 OHIO ST. L.J. 1401, 1407-08 (1992) (urging for the reform of the current one-year scholarship agreement).

[127] Sean M. Hanlon, *Athletic Scholarships as Unconscionable Contracts of Adhesion: Has the NCAA Fouled Out?*, 13 SPORTS L.J. 41, 76 (2006); *see also* Riella, *supra* note 1, at 2210-15 (applying the doctrines of procedural and substantive unconscionability to the NLOI).

[128] Universities in fact may hinder their student-athletes' ability to receive a meaningful education. Monica L. Emerick, Comment, *The University/Student-Athlete Relationship: Duties Giving Rise to a Potential Educational Hindrance Claim*, 44 UCLA L. REV. 865, 890-98 (1997); *see also* Michael R. Lufrano, *The NCAA's Involvement in Setting Academic Standards: Legality and Desirability*, 4 SETON HALL J. SPORTS L. 97 (1994) (discussing the NCAA's regulation of eligibility standards).

should take precedence over one's status as an athlete.[129] As a result of such concerns, reforms have been proposed to re-focus collegiate athletics on the education—not the exploitation—of the student-athlete. [130] Recent cases and commentaries have questioned another alleged form of exploitation by the NCAA and its members: the student-athlete's common law right of publicity.[131] For example, Hall of Fame basketball player Oscar Robertson is among three former college athletes who filed suit

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[129] John R. Allison, *Rule-Making Accuracy in the NCAA and Its Member Institutions: Do Their Decisional Structures and Processes Promote Educational Primacy for the Student-Athlete?* 44 U. KAN. L. REV. 1, 56 (1995) (identifying seven characteristics which question the purported primacy of the educational goal and exploring potential remediation strategies).

[130] *See, e.g.*, Louis Hakim, *The Student-Athlete vs. The Athlete Student: Has the Time Arrived for an Extended-Term Scholarship Contract?*, 2 VA. J. SPORTS & L. 145, 170-71 (2000) (arguing for a four or five year scholarship contract wherein the student-athlete and institution are bound to an extended-term commitment so as to aid the student-athlete's ability to obtain an educational degree); Rodney K. Smith & Robert D. Walker, *From Inequity to Opportunity: Keeping the Promises Made to Big-Time Intercollegiate Student-Athletes*, 1 NEV. L.J. 160, 163-69 (2001) (discussing models for dealing with problems of economic inequity and the slippage in educational values plaguing intercollegiate athletics); Harold B. Hilborn, Comment, *Student-Athletes and Judicial Inconsistency: Establishing a Duty to Educate as a Means of Fostering Meaningful Reform of Intercollegiate Athletics*, 89 NW. U. L. REV. 741, 757-58 (1995) (urging courts to acknowledge an actionable *duty to educate* based on the special relationship between the university and student-athletes); *see also* Robert A. McCormick & Amy Christian McCormick, *A Trail of Tears: The Exploitation of the College Athlete*, 11 FLA. COASTAL L. REV. 639 (2010) (discussing exploitation generally).

[131] *See* Kristine Mueller, *No Control Over Their Rights of Publicity: College Athletes Left Sitting the Bench*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 70, 97-99 (2004) (examining the assignment of the right of publicity by college athletes); Kristal S. Stippich & Kadence A. Otto, *Carrying a Good Joke Too Far? An Analysis of the Enforceability of Student-Athlete Consent to Use of Name & Likeness*, 20 J. LEGAL ASPECTS SPORT 151, 178-80 (2010) (examining the enforceability of the athlete's consent form and the cross purposes of the student's alleged amateur status in conjunction with the NCAA's commercialization of the use of a student-athlete's name and likeness); Bill Cross, Comment & Note, *The NCAA as Publicity Enemy Number One*, 58 U. KAN. L. REV. 1221, 1244 (2010) (concluding that the NCAA has no legal right to profit from the use of the name and or likeness of college athlete in commercial dealings); Sean Hanlon & Ray Yasser, Comment, *"J.J. Morrison" and his Right of Publicity Lawsuit Against the NCAA*, 15 VILL. SPORTS & ENT. L.J. 241, 243-44 (2008) (arguing that the NCAA's use of the identity of star athletes for commercial advantage is unlawful appropriation that violates the student-athlete's right of publicity); Leslie E. Wong, Comment, *Our Blood, Our Sweat, Their Profit: Ed O'Bannon Takes on the NCAA for Infringing on the Former Student-Athlete's Right of Publicity*, 42 TEX. TECH L. REV. 1069, 1104-05 (2010) (supporting the establishment of a trust fund for former student-athletes with commercially generated revenues).

against the NCAA this year for the alleged illegal use of their images.[132]

Certainly the recruitment of high school athletes is a competitive process that does not necessarily center upon what is in the best interest of the student-athlete.[133] In fact, issues concerning the recruiting of high school athletes have been a focal point of controversy over the life of the NCAA.[134] The recruiting of high school athletes is crucial for the success of the institution's athletic programs, the commensurate financial revenue stream for the institution, as well as for the success of the coaching staff, both financially and professionally.[135] The amount of revenue produced by intercollegiate athletics is substantial[136] and accompanied by the benefits of "money and support for the

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[132] Nancy Kercheval, *Oscar Robertson Among Former College Athletes Suing NCAA, Electronic Arts*, BLOOMBERG, http://www.bloomberg.com/news/2011-01-27/oscar-robertson-among-former-college-athletes-suing-ncaa-electronic-arts.html (last visited Nov. 1, 2011).

[133] The NLOI program was initiated "[t]o deter '*school-jumping*' by prospective student athletes" and was "drafted to protect the school's interests." Johnson, *supra* note 61, at 114.

[134] For example, one notorious case involved Jerry Tarkanian and his dismissal as head coach for UNLV basketball as a result of recruiting violations. *See* Kadence A. Otto & Kristal S. Stippich, *Revisiting* Tarkanian*: The Entwinement and Interdependence of the NCAA and State Universities and Colleges 20 Years Later*, 18 J. LEGAL ASPECTS SPORT 243, 261-63 (2008) (discussing the controversy). Congress held a hearing in the 1970s to examine issues with the NCAA's ability to self-regulate regarding recruiting violations and other serious infractions. Alice I. Youmans, Joan S. Howland & Myra K. Saunders, *Regular Features: Questions and Answers*, 82 LAW LIBR. J. 627, 638-40 (1990). Subsequently, scandals concerning payments to athletes by booster groups and alumni led to an investigation and a subsequent restructuring of processes and oversight after the Knight Commission Report. Jay Jordan, *Reform From a Student-Athlete's Perspective: A Move Towards Inclusion*, 14 U. MIAMI ENT. & SPORTS L. REV. 57, 60-76 (1997) (discussing NCAA structural changes passed and implemented in the late 1990s); *see also* W. Burlette Carter, *Student-Athlete Welfare in a Restructured NCAA*, 2 VA. J. SPORTS & L. 1, 6-38, 95-97 (2000) (discussing the restructuring of 1996–1997 and offering additional suggestions for reform).

[135] Jon Perrelle, Note, *An Opportunity for Reform:* Tennessee Secondary School Athletic Association v. Brentwood Academy *and NCAA Recruiting*, 74 BROOK. L. REV. 1213, 1251 (2009) (concluding that "recruiting has become a corrupt process that exposes high school student-athletes to inappropriate situations, exploits the student-athletes, and sacrifices academic success for athletic excellence").

[136] For the 2008–2009 academic year, the top ten revenue generating college athletic programs earned a combined $1,031,170,136 in revenue and netted a combined $117,556,724. Bill King, *Life's Lessons*, SPORTS BUS. J., http://www.sportsbusinessdaily.com/Journal/Issues/2010/06/20100621/SBJ-In-Depth/Lifes-Lessons.aspx (last visited Nov. 1, 2011).

university; enthusiasm and cohesion to the university community; and enjoyment for the region and entire nation."[137]

Unfortunately, ethical lines are often crossed in pursuit of the golden goose. Reports of improper recruiting tactics abound, and include the use of drugs, alcohol, sex, monetary enticements, grades and test alterations, as well as false representations.[138] Arguably, "[t]he inherent conflict of interest in the universities' bargaining position rebuts the presumption that the schools act in good faith, and demonstrates the need for legal protection of the weaker party."[139] Tales of coaches inking lucrative endorsement contracts in exchange for their players wearing certain athletic gear, scandals involving the sale of players by high school coaches, stories of alumni and boosters compromising the integrity of athletic programs to secure top talent,[140] all lend credence to the notion that the recruitment process is a mine field for the unwary, unsophisticated recruit.[141]

Some student-athletes have sued concerning misrepresentations made during the recruiting process about their prospective playing time.[142] Oral misrepresentations made prior

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[137] Eric J. Sobocinski, *College Athletes: What Is Fair Compensation?*, 7 MARQ. SPORTS L.J. 257, 291 (1996).

[138] Perrelle, *supra* note 135, at 1234-35. Further, "recruits have chosen schools based solely on their dreams of playing professional sports, fake books and magazine covers that played on these dreams, their weariness with the recruiting process, and even what number they can wear." *Id.* at 1235.

[139] Johnson, *supra* note 61, at 123.

[140] *See* Marc Jenkins, *The United Student-Athletes of America: Should College Athletes Organize in Order to Protect Their Rights and Address the Ills of Intercollegiate Athletics?*, 5 VAND. J. ENT. L. & PRAC. 39 (2003) (relating incidents of both legitimate and non-legitimate practices). For a discussion of the economics of coaches' contracts in big-time college football and basketball, including the dramatic increase in coaches' compensation and retention strategies used by universities for revenue-generating coaches, see Richard T. Karcher, *The Coaching Carousel in Big-Time Intercollegiate Athletics: Economic Implications and Legal Considerations*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 4-47 (2009).

[141] *See* Katherine Sulentic, Note & Comment, *Running Backs, Recruiting, and Remedies: College Football Coaches, Recruits, and the Torts of Negligent and Fraudulent Misrepresentation*, 14 ROGER WILLIAMS U. L. REV. 127, 132 (2009) (asserting that fraudulent and negligent misrepresentation have become part of the college football recruiting landscape).

[142] *See* Timothy Liam Epstein, *Splinters from the Bench: Feasibility of Lawsuits by Athletes Against Coaches and Schools for Lack of Playing Time*, 4 VA. SPORTS & ENT. L.J. 174, 186-90 (2005) (discussing *disappointment* lawsuits and the alleged proprietary interest student-athletes have in their athletic reputations); James

to signing day are particularly susceptible to overreaching during the recruitment process when most prospects are inexperienced minors negotiating with seasoned university representatives.[143] "Courts have employed the infancy doctrine to afford greater protection to minors, and the NCAA should be obliged to do so as well."[144]

Criticism that the process is riddled with corrupt practices fuels the concern that minors must be protected from the flurry of predatory adults who do not have their best interests at heart—the same concern that prompted the judicial development of the infancy doctrine under the common law in the first place. Granted, a few months of maturity may not remedy the situation for individual minors who attain the age of majority in relatively short order, but the systemic ignoring of a basic tenet of the legal system certainly adds no credence to the recruitment process. The less well-reasoned, sometimes irrational, decision-making of adolescents counsels against the abrogation of a settled principle of the common law with respect to this genre of agreements.[145]

B. Recommendations

Some commentators recognize that the big business of intercollegiate athletics suggests the decline of amateurism in college sports.[146] If, as a sixty-billion dollar industry, major college sports enterprises indeed are not amateur, and such a characterization is demonstrably false, then arguably

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Kennedy Ornstein, Comment, *Broken Promises and Broken Dreams: Should We Hold College Athletic Programs Accountable for Breaching Representations Made in Recruiting Student-Athletes?*, 6 SETON HALL J. SPORTS L. 641, 667-68 (1996) (condemning the practices of some college recruiters and evaluating potential liability).

[143] Jamie Y. Nomura, Note, *Refereeing the Recruiting Game: Applying Contract Law to Make the Intercollegiate Recruitment Process Fair*, 32 U. HAW. L. REV. 275, 276-77 (2009) (documenting unfairness in the recruitment process and arguing for reform).

[144] *Id.* at 288.

[145] Perrelle, *supra* note 135, at 1235.

[146] Because amateurism in college athletics has almost disappeared, some suggest taking the next step toward transforming college athletics into a semi-professional organization. Leroy D. Clark, *New Directions for the Civil Rights Movement: College Athletics as a Civil Rights Issue*, 36 HOW. L.J. 259, 274-76 (1993); *see also* Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 206 (1990) (asserting that intercollegiate amateur athletics is really a revenue-producing venture).

intercollegiate athletics should be subject to the application of antitrust, tax, and labor laws.[147] Given this realization, several observers are in favor of compensating Division I athletes.[148] Should the historical classification of amateurism of college athletics be modified in favor of paying athletes salaries as semi-professionals, more state statutes governing minors in the sports industry could be applicable to make the NLOI valid, provided the state statutory requirements for court approval were followed and the statutory definitions reasonably could be read to include athletes.[149]

Alternatively, the *No-Agency Rule* could be abandoned in favor of allowing minors to be represented by someone who owes a fiduciary duty to act in the best interest of the student-athlete and to protect the minor from overreaching by university recruiters and coaches.[150] Unfortunately, in reality, this approach likely would be available only to assist those athletes whose future commercial potential is substantial. It is unlikely that agents would scramble to represent the greater number of athletes who do not play in Division I's prestigious programs. Thus, such a proposal could be only a partial solution in practice.

Would a statutory exception to the common law that establishes the validity of NLOI agreements be feasible? The infancy doctrine is an integral part of the *common law* of contracts, which by definition is a matter of state law.[151] To change the state common law in this regard would necessitate requesting each state legislature to carve a statutory exception to

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[147] Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 498-505 (2008).

[148] Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 HAMLINE L. REV. 24, 28 (2000) (claiming that it is unjust for schools to make huge revenues and not share that money with the athletes); Riggs, *supra* note 7, at 141-44 (arguing for the replacement of the NCAA's concept of amateurism so that student-athletes can receive a share of the profits they generate).

[149] For a discussion of current state statutes that allow court approval and supervision of contracts for the services of child performers, see *supra* notes 107-23 and accompanying text.

[150] *See* Nomura, *supra* note 143, at 297-99 (suggesting that the NCAA should mandate that high school recruits have an official representative).

[151] "There is no federal general common law . . . ." Erie R.R. Co. v. Thompkins, 304 U.S. 64, 78 (1938).

the state's jurisprudence on the infancy doctrine for the NLOI agreement—a fairly daunting proposition. While federal regulation under the Commerce Clause of intrastate activity is permitted when that activity is economic in nature, [152] for Congress to pass a law in order to cloak minors across the nation with contractual capacity for NLOI agreements seems a rather heavy-handed response, and seemingly would necessitate an admission that the enterprise is about the economics and not the education. Moreover, even if either a uniform state act or a federal law could be proposed, for what would it provide? The validity of all NLOI agreements? Court approval of NLOI agreements? Court-approved representation in the NLOI negotiation?

Less drastic measures than a legislative response or the abandonment of amateurism and the no-agency rule are available. The NLOI agreement is voidable until the minor reaches the age of majority, which is eighteen years in most states. However, once the student-athlete has reached the age of majority and continues to participate as a member of the sports team, such conduct arguably indicates the intent to be bound by the NLOI; that conduct arguably would constitute a ratification of a previously voidable agreement, the effect of which would be to make the NLOI agreement valid. [153] Rather than rely on conduct manifesting the intent to be bound, a wiser course of action would be for the institution instead to require the student-athlete to ratify the agreement expressly in writing at the age of majority. Of course this option leaves the institution vulnerable for the time period between signing day and the student-athlete's eighteenth birthday.

While some observers have called for the complete elimination of the NLOI agreement,[154] another option is for the NCAA to abandon the arbitrary deadlines imposed by the various national signing days and permit athletes to sign a binding NLOI on their eighteenth birthday. Arguably the elimination of a

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[152] United States v. Lopez, 514 U.S. 549, 559-60 (1995).

[153] Ratification consists of words or conduct manifesting an intent to be bound by a previously voidable contract. CALAMARI & PERILLO, *supra* note 5, at § 8.4.

[154] Seth Davis, *To Sign or Not to Sign: For Recruits, Letters of Intent Are Not the Best Option*, SI.COM (Nov. 14, 2007 11:30 AM), http://sportsillustrated.cnn.com/2007/writers/seth_davis/11/13/national.letter/ (arguing for a greater voice for prospective athletes in the agreement).

national signing day could help to level the playing field more between the university and the athlete, since coaches tend to oversign athletes, many of whom are dismissed before the season effectively starts. [155] A uniform day was established for the convenience of universities, not the student-athlete, and that rationale is insufficient for completely disregarding the common law's infancy doctrine. While such a change could result in a more chaotic recruiting process for athletic departments, in reality it would protect the institution because recruits who are minors could walk away from the NLOI agreement without ramification, contrary to what it states.

What of prospective players who will not be eighteen years old before the start of practice season? Currently, there is no mandatory requirement for a NLOI agreement, so the athlete could report and play without having signed one. [156] True, the current *basic penalty* of the loss of one season and a required one academic year in residence at the next institution before being able to play is unavailable because the agreement is voidable;[157] however, it would seem that the parent could act as a surety for the financial aid offer extended. In other words, since scholarship offers are limited,[158] it would seem reasonable for the institution to protect its financial position against the minor's disaffirmance by allowing liquidated damages equivalent to the financial aid irrevocably committed and potentially lost if the minor left the institution. [159] Of course, the language used to convey this

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[155] Nomura, *supra* note 143, at 300-01; *see also* Andy Staples, *Eliminate Signing Day Entirely*, SI.COM (June 6, 2008, 12:20 PM), http://sportsillustrated.cnn.com/2008/writers/andy_staples/06/05/early.signingday/index.html (calling for the elimination of signing day in favor of allowing student-athletes to sign whenever they wish).

[156] *About the National Letter of Intent (NLI)*, NCAA, http://www.ncaa.org/wps/wcm/connect/nli/nli+/about+the+nli/index.html (last visited Nov. 1, 2011).

[157] *See supra* notes 22-24 and accompanying text (discussing the basic penalty).

[158] While the number of offers for full-scholarships is limited, there is no rule about how many NLOI agreements a school can send to players. Jeremy Crabtree, *SEC Sets Limits on Player Signings: Will Others Follow?*, RIVALS.COM (June 4, 2009, 3:03 PM), http://www.usatoday.com/sports/recruiting/football/2009-06-04-sec-oversigning_N.htm.

[159] Arguably, this approach could be utilized for any prospective student-athlete who accepted a financial aid offer, not just those recruits who are not yet eighteen when practice season begins. Of course, such a provision must protect a real pecuniary stake advanced by the institution and not be used as a coercive tactic to force parents to force their children to abide by the NLOI agreement. For a discussion of the validity of liquidated damages clause, see *supra* notes 90-91 and accompanying text.

provision should be clear and unambiguous, in bold print, and adequately explained to recruits and their co-signors, with a disclosure that a signed agreement is not required in order to participate in the institution's athletic program. And while agreed upon damages may be recoverable, provided they are reasonable and related to the foreseeable harm flowing from a breach, the institution could not penalize student-athletes from changing schools if they are minors when they sign the NLOI.

Finally, even if the first-year student-athlete becomes of age and signs a binding NLOI agreement, that student typically still may be impressionable, unsophisticated, and naïve. Many student-athletes choose the school for which they will play because of the coach, who assumes a somewhat parental position in their relationship to the young athlete. Predictably, then, a coaching change is one of the major reasons student-athletes seek to be released from their signed NLOI agreement.[160] Arguably, the inability of the student-athletes to make an informed decision about their choice of school in such cases counsels against holding them to the agreement, even if they are of age when it is signed.[161] As a result, the NCAA should also seriously consider permitting a limited exception to all valid NLOI agreements and as a matter of policy to permit student-athletes, at their discretion, to rescind their commitment in the event of a coaching change. This policy shift may not be in the best interest of the member schools, but it would be in the best interest of the young student-athlete, who in good faith accepted the bid in reliance on existing facts concerning the coaching staff.

CONCLUSION

Thousands of prospective student-athletes sign NLOI agreements every year. A great number of these enthusiastic recruits are minors and are not bound by the agreement under the common law's infancy doctrine. The fact that their parents signed in approval has no legal effect other than to mislead the minor

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[160] Meyer, *supra* note 1, at 237-40, 246-47. The NLOI agreement binds the student even if there is a coaching change because the NLOI expressly provides that the prospective student-athlete signs with an institution, not with a coach. *National Letter of Intent*, *supra* note 30.

[161] Meyer, *supra* note 1, at 240.

into believing in the irrevocability of their commitment. Unfortunately, the student-athlete's punishment for breaching the voidable agreement is the loss of one season of competition and a required one academic year in residence before competing for another institution, a penalty enforced by the NLOI's member institutions, which otherwise would be sanctioned for permitting students to play unless they were released from their NLOI agreement. While some state laws recognize the need for child performers to enter into valid contracts for services, and permit court approval of such contracts, amateur intercollegiate athletes are unlikely to be covered by such laws. Given the predatory minefield that characterizes college recruiting today, the NCAA should recognize the protection afforded minors by the common law and abandon its established signing days in favor of allowing student-athletes to enter into valid agreements once they have reached the age of majority. As it stands, the NCAA is perpetuating a charade with its basic penalty provision and misleading thousands of recruits into believing they are bound once they sign the NLOI agreement, when in fact that agreement is voidable during their minority *and* for a reasonable period of time thereafter, provided there has not been an express or implied ratification of the agreement.

COMMENT

JUVENILES ARE DIFFERENT: JUVENILE LIFE WITHOUT PAROLE AFTER *GRAHAM V. FLORIDA*

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INTRODUCTION

Peter A. was only fifteen years old when his older brother instructed him to help an eighteen-year-old steal a van.[1] After stealing the van, Peter sat unarmed in the back seat with a twenty-one-year-old while the eighteen-year-old drove them to the home of the men they were told robbed Peter's brother.[2] Once they arrived, Peter remained in the van while the others went into the residence.[3] Shortly afterward, Peter heard gunshots, followed by one of the young men racing to the van.[4] While the two fled, Peter learned that two people were shot to death during the failed robbery.[5]

Once arrested, Peter admitted to his role in stealing the van.[6] He admitted to being present at the scene but asserted that he "never shot or killed anyone."[7] In support of his account, no physical evidence indicated that Peter entered the victims' home, and the prosecution proved at trial that one of his co-defendants pulled the trigger.[8] Under mandatory sentencing laws, however, Peter will spend the rest of his life behind bars with no possibility of re-entering society.[9]

Peter A.'s case illustrates the need to allow juvenile offenders an *opportunity*—not a *guarantee*—to eventually obtain freedom.[10] Research shows that significant psychological and neurological

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[1] AMNESTY INT'L & HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 11 (2005), *available at* http://www.hrw.org/node/11578/section/1.

[2] *Id.* at 11-12. According to Peter, "[N]o one sat in the front passenger's seat because 'there was glass on the seat'" from the broken front window. *Id.* at 12.

[3] *Id.* at 12.

[4] *Id.*

[5] *Id.* Peter later found out that one of the victims was a close friend who had no role in the original robbery of Peter's brother. *Id.*

[6] *Id.* Police questioned Peter for eight hours without the presence of his mother or an attorney. *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* Due to proof that Peter stole the van driven to the victim's house, he was convicted of two counts of felony murder and sentenced to life without parole. *Id.*

[10] Throughout this article, all references to "juveniles" refer to persons under the age of eighteen.

differences exist between adults and adolescents,[11] which demonstrate reduced levels of culpability in juveniles. In *Roper v. Simmons*, the Supreme Court recognized this reduced culpability and adopted a categorical rule prohibiting the death penalty for defendants who committed crimes before the age of eighteen.[12]

The Court's recent decision in *Graham v. Florida* extended the holding in *Roper* to exempt juveniles from sentences of life without parole for committing crimes short of homicide.[13] In doing so, the Court examined the evolving standards of decency in the United States, as it did in *Roper*, and held that the sentence violated the cruel and unusual punishment clause of the Eighth Amendment.[14] First, the Court looked to the "objective indicia" of state legislatures and juries and found that a national consensus existed against the practice of issuing life sentences to juvenile offenders.[15] Then, the Court applied its own independent judgment and found the punishment cruel and unusual due to juveniles' reduced culpability and the sentence's lack of penological justifications.[16]

The Court's decision marked the first use of its "evolving standards of decency" analysis for a non-capital case.[17] Previously, this categorical approach was reserved for death penalty cases alone, based on the notion that "[d]eath is different."[18] Now, however, after *Graham*, non-capital offenses are subject to categorical exemption under the Eighth Amendment.

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[11] *See, e.g.*, Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 742-43 (2000); Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships during Postadolescent Brain Maturation*, 21 J. NEUROSCIENCE 8819, 8819-20 (2001); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1013 (2003); *see infra* Part III.

[12] 543 U.S. 551, 578 (2005).

[13] 130 S. Ct. 2011, 2034 (2009). For brevity's sake, throughout this article life imprisonment without the opportunity or possibility of parole is referred to as simply "life without parole."

[14] *Id.*

[15] *Id.* at 2023-26.

[16] *Id.* at 2026-30.

[17] *Id.* at 2021-23.

[18] *Id.* at 2046 (Thomas, J., dissenting).

Applying the reasoning in *Graham*, this article argues that under the evolving standards of decency analysis, sentencing juveniles to life without parole—for any crime—violates the Eighth Amendment because *juveniles are different*. As a class, juveniles are less culpable than adults.[19] This limited culpability should be viewed no differently when applied to homicide than when applied to non-homicide offenses. Further, the penological justifications of sentencing juveniles to life without parole fail because of the unique nature of adolescence. In short, this article argues that juveniles are different than adults, and therefore deserve an *opportunity*—not a *guarantee*—to eventually obtain freedom, no matter the crime.

Part II of this article provides a history of juvenile jurisprudence in the context of the Eighth Amendment. Part III discusses why juveniles are uniquely different than adults. Part IV reconsiders the constitutionality of sentencing juveniles to life without parole after *Graham v. Florida*. Part V then argues for the broadening of the traditional definition of "juvenile" and presents a possible framework as a solution to the arbitrary nature of the current meaning.

I. JUVENILE JURISPRUDENCE OF THE EIGHTH AMENDMENT

When evaluating whether a category of punishment violates the Eighth Amendment prohibition against cruel and unusual punishment, the Court consults "the evolving standards of decency that mark the progress of a maturing society."[20] To determine the "evolving standards of decency," the Court employs a two-part inquiry. First, the Court reviews the "objective indicia" of relevant legislative enactments and sentencing juries to identify a national consensus against the mode of punishment at issue.[21] Then, the Court applies its own independent judgment to determine whether the particular punishment is cruel and unusual.[22] In making that judgment, the Court is guided by "the standards elaborated by

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[19] Roper v. Simmons, 543 U.S. 551, 569 (2005); *see supra* note 11 and accompanying text.

[20] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[21] *Roper*, 543 U.S. at 564.

[22] Coker v. Georgia, 433 U.S. 584, 597 (1977).

controlling precedents and on the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose."[23] Specifically, the Court examines whether the particular punishment is justified by legitimate penological goals.[24]

Until the Court's recent decision in *Graham*, the use of its evolving standards of decency analysis was reserved for capital crimes alone, based on the notion that "[d]eath is different."[25] Now, however, non-capital offenses are subject to categorical exemption under the Eighth Amendment. The evolution of the Supreme Court's application of this standard in juvenile jurisprudence is outlined below.

A. Thompson v. Oklahoma

The Supreme Court first considered the constitutionality of juvenile punishment in the Eighth Amendment context in 1988 with its decision in *Thompson v. Oklahoma*.[26] William Wayne Thompson committed murder at the age of fifteen.[27] He was tried as an adult and sentenced to death, along with three older participants in the crime.[28] Thompson appealed his sentence, arguing that sentencing a defendant to death who was fifteen years old at the time of his offense violated the cruel and unusual punishment clause of the Eighth Amendment.[29]

To identify the existence of a national consensus against the punishment, the Court first reviewed relevant state legislation.[30] The Court began by examining various state statutes that define

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[23] Kennedy v. Louisiana, 554 U.S. 407 (2008).

[24] *Id.* at 440-47.

[25] Graham v. Florida, 130 S. Ct. 2011, 2046 (2010) (Thomas, J., dissenting). Justice Thomas further declared that "[t]oday's decision eviscerates that distinction. 'Death is different' no longer." *Id.*

[26] 487 U.S. 815 (1988) (Stevens, J., plurality).

[27] *Id.* at 819. Thompson, along with three older participants, shot and stabbed his former brother-in-law. *Id.* The body was found in a river four weeks later chained to a concrete block. *Id.*

[28] *Id.* at 819-20. The Criminal Court of Appeals of Oklahoma affirmed the conviction and sentence. *Id.* at 820.

[29] *Id.* at 818-19.

[30] *Id.* at 823-24.

"[t]he line between childhood and adulthood."[31] Specifically, the Court noted that fifteen-year-olds could not vote or serve on a jury in any state, drive without parental consent in all but one state, or marry without parental consent in all but four states.[32] The most relevant legislation, however, was that all states designated sixteen as the maximum age for juvenile court jurisdiction.[33]

Next, the Court surveyed state death penalty legislation.[34] At the time, most state legislatures had not expressly established a minimum age of eligibility for the death penalty.[35] Of the states that had, however, all required that the defendant attain at least the age of sixteen at the time of the capital offense.[36] Finally, noting the rarity of executions of persons under the age of sixteen,[37] the Court came to the "unambiguous conclusion" that the imposition of capital punishment on a fifteen-year-old offender was "generally abhorrent to the conscience of the community."[38]

The Court then brought its own "judgment to bear"[39] to determine whether the punishment was cruel and unusual. In making that judgment, the Court first noted the reduced culpability of juveniles.[40] It then considered the principal social

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[31] *Id.* at 824.

[32] *Id.* at 823-24. The Court also noted that in the states that had passed laws on the subject, "no one under age 16 may purchase pornographic materials (50 States), and in most States that have some form of legalized gambling, minors are not permitted to participate without parental consent (42 States)." *Id.* at 824.

[33] *Id.* at 824.

[34] *Id.* at 826-29. In its review of state legislation, the plurality cited many industrialized Western nations' limitations on capital punishment—particularly juvenile executions. *Id.* at 830-31.

[35] *Id.* at 826. Fourteen states did not authorize capital punishment, and nineteen others allowed capital punishment, but had not set a minimum age requirement. *Id.* at 826-27.

[36] *Id.* at 829. Eighteen state statutes expressly established a minimum age requirement. *Id.*

[37] *Id.* at 832. The last execution for a crime committed before age sixteen was in 1948, forty years prior. *Id.*

[38] *Id.*

[39] Coker v. Georgia, 433 U.S. 584, 597 (1977) ("[I]n the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.").

[40] *Thompson*, 487 U.S. at 833-35. The Court stated that "[t]he basis for this conclusion is too obvious to require extended explanation." *Id.* at 835.

purposes of the death penalty: retribution and deterrence.[41] Because of juveniles' reduced culpability, capacity for growth, and "society's fiduciary obligations to its children," the Court found that retribution did not justify the execution of a fifteen-year-old offender.[42] Further, the Court found that the death penalty did not deter persons under the age of sixteen because of their reduced capacity for decision-making.[43] Thus, the national consensus against the imposition of the death penalty on an offender under the age of sixteen, coupled with the lack of measurable contribution to the social purposes of capital punishment, rendered the imposition of the death penalty on offenders under the age of sixteen at the time of the offense unconstitutional.[44]

B. Stanford v. Kentucky

One year after the decision in *Thompson*, the Supreme Court revisited the constitutionality of the juvenile death penalty in *Stanford v. Kentucky*.[45] In *Stanford*, however, the Court considered whether the Eighth Amendment prohibits the execution of juveniles *over* the age of sixteen at the time of the offense.[46] The matter before the Court involved the consolidated appeals of two juveniles sentenced to death.[47] In the first case, seventeen-year-old Kevin Stanford and an accomplice raped and sodomized a gas station attendant during the course of a robbery and then drove her to a remote area where Stanford shot her to death.[48] In the second case, sixteen-year-old Heath Wilkins and an accomplice robbed a convenience store.[49] During the robbery,

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[41] *Id.* at 836.

[42] *Id.* at 836-37.

[43] *Id.* at 837-38.

[44] *Id.* at 838. Although Thompson argued for a bright-line rule prohibiting the execution of any person who was under the age of eighteen at the time of the offense, the Court limited its decision to consider only the imposition of the punishment on anyone under sixteen. *Id.*

[45] 492 U.S. 361 (1989).

[46] *Id.* at 368. It is worth noting that "over the age of sixteen" means on or past an offender's sixteenth birthday.

[47] *Id.* at 364-65.

[48] *Id.* at 365.

[49] *Id.* at 366.

Wilkins stabbed an employee to death as part of a preconceived plan.[50] Stanford and Wilkins were tried as adults and sentenced to death.[51] On appeal, Stanford argued that the Eighth Amendment prohibits the imposition of the death penalty on offenders under age eighteen at the time of their crime; Wilkins argued under age seventeen was proper.[52]

In an opinion by Justice Scalia, the plurality began its analysis by citing two tests to determine whether a particular punishment violates the Eighth Amendment.[53] The first test considers whether the punishment constitutes one of "those modes or acts of punishment . . . considered cruel and unusual at the time that the Bill of Rights was adopted."[54] The second test looks at the category of punishment and determines whether the punishment is "contrary to the 'evolving standards of decency that mark the progress of a maturing society.'"[55] The Court rejected the first test outright since, at the time the Bill of Rights was adopted, the common law allowed capital punishment in theory at age seven and in practice at age fourteen.[56]

Next, the Court considered whether the punishment was contrary to the evolving standards of decency.[57] The plurality began its survey of objective evidence of society's view by examining state statutes.[58] The Court noted that of the thirty-seven states that permitted capital punishment, twenty-two allowed it for sixteen-year-old offenders while twenty-five allowed it for seventeen-year-old offenders.[59] Based on this information, the Court found that no national consensus existed against

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[50] *Id.*

[51] *Id.* at 365-68.

[52] *Id.* at 368.

[53] *Id.* at 368-69.

[54] *Id.* at 368 (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)).

[55] *Id.* at 369 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

[56] *Id.* at 368.

[57] *Id.* at 369.

[58] *Id.* at 370. The majority consisted of the *Thompson* dissenters (Chief Justice Rehnquist, Justice White, and Justice Scalia) along with Justice Kennedy, who did not participate in *Thompson*, and Justice O'Connor, who concurred in part and in the judgment. *Id.* at 364.

[59] *Id.* at 370.

executing offenders aged sixteen or seventeen.[60] Further, accepting the proposition that the legislation itself did not establish a settled consensus, the Court rejected as irrelevant the defendants' argument that the actual application of the laws as reflected by sentencing juries showed a consensus against the punishment.[61]

Then, in Part IV-B of the opinion, which only a minority embraced,[62] the Court rejected the argument that, by analogy, other minimum age statutes show a national consensus.[63] Lastly, in Part V, Justice Scalia "emphatically reject[ed]" the continued use of the Supreme Court's own subjective judgment in determining whether a particular punishment is cruel and unusual.[64] Justice O'Connor, however, rejected Part V of the plurality opinion, leaving the Court's independent judgment as a valid approach.[65] Accordingly, because of the lack of a national consensus, the Court held that the imposition of the death penalty on offenders who committed crimes at age sixteen or seventeen does not constitute cruel and unusual punishment.[66]

C. Roper v. Simmons

In *Roper v. Simmons*, the Court addressed, "for the second time in a decade and a half," the issue decided in *Stanford*: whether the Eighth Amendment prohibits the execution of an offender who was sixteen or seventeen when he committed a capital crime.[67] At age seventeen, Christopher Simmons planned

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[60] *Id.* at 371-72.

[61] *Id.* at 374. Scalia reasoned that although only two percent of executions involved offenders who committed their crime before age eighteen, far fewer capital crimes are committed by offenders under the age of eighteen, which accounts for the discrepancy in treatment. *Id.*

[62] *Id.* Justice O'Connor did not join the plurality in Part IV-B or Part V. *Id.* at 364.

[63] *Id.* at 374-77.

[64] *Id.* at 377-78. Justice Scalia also rejected the use of public opinion polls, the views of interest groups, and the positions of professional organizations to show a national consensus. *Id.* at 377.

[65] *Id.* at 380-82. Justice O'Connor agreed that no national consensus existed against the execution of sixteen and seventeen-year-old offenders, but concluded that the Court has a constitutional obligation to conduct a proportionality analysis. *Id.*

[66] *Id.* at 380.

[67] Roper v. Simmons, 543 U.S. 551, 555-56 (2005).

and committed murder.[68] Late one evening, Simmons and an accomplice broke into the home of the victim and bound her hands with duct tape.[69] The two then drove her to a state park and threw her off of a bridge where she later drowned.[70] Simmons was tried as an adult and sentenced to death.[71]

After a series of rejected appeals, the Supreme Court granted certiorari in light of its 2002 decision in *Atkins v. Virginia*.[72] In *Atkins*, the Court found a national consensus against executing mentally retarded criminals, and decided that mental retardation reduces moral culpability such that the death penalty is an excessive punishment, and therefore prohibited by the Eighth Amendment.[73] Using the reasoning in *Atkins*, Simmons argued that the Eighth Amendment forbids the execution of a juvenile who was under age eighteen at the time of the offense.[74]

Writing for the majority, Justice Kennedy began his analysis by reconsidering "[t]he evidence of national consensus."[75] The fact that thirty states rejected the juvenile death penalty outright, combined with the infrequency of its use in those states without formal prohibition and a trend towards the abolition of the juvenile death penalty, led the Court to find that the national consensus had changed since *Stanford*."[76] The Court determined that society had evolved, and now viewed juveniles as "categorically less culpable than the average criminal."[77]

Then, after identifying a national consensus against the sentencing practice, the Court exercised its own independent judgment.[78] It cited three general differences between juveniles

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[68] *Id.* at 556.

[69] *Id.*

[70] *Id.* at 556-57.

[71] *Id.* at 557-58.

[72] *Id.* at 559.

[73] Atkins v. Virginia, 536 U.S. 304, 321 (2002).

[74] *Roper*, 543 U.S. at 559.

[75] *Id.* at 564-67. It is important to note that Justice Kennedy joined the majority in *Stanford*. *See supra* notes 45-61 and accompanying text.

[76] *Id.* at 564-65. The Court noted that since *Stanford*, six states had executed offenders for crimes committed as juveniles, only three of which had done so in the previous ten years. *Id.*

[77] *Id.* at 567 (quoting *Atkins*, 536 U.S. at 316).

[78] *Id.* at 568-72.

and adults that "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders."[79] First, juveniles have a diminished capacity for decision-making because of "[a] lack of maturity and an underdeveloped sense of responsibility."[80] Second, juveniles have a heightened vulnerability to negative influences and outside pressures, such as peer pressure.[81] And third, juveniles have a relatively unformed character.[82] Because of their reduced culpability, the Court concluded that the social purposes served by the death penalty—retribution and deterrence—"apply to [juveniles] with lesser force than to adults," and therefore do not provide adequate justification for imposing capital punishment on offenders under age eighteen.[83]

Lastly, the Court noted that its holding was supported by "the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."[84] In particular, the majority pointed to the fact that only the United States and Somalia had not ratified Article 37 of the United Nations Convention on the Rights of the Child, which expressly prohibits capital punishment for offenders under age eighteen.[85] Thus, the Court's own independent evaluation confirmed society's view that the death penalty is an unconstitutionally disproportionate punishment when applied to offenders under age eighteen.[86] Accordingly, by a 5-4 majority, the Court overruled *Stanford* and held that the Eighth Amendment

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[79] *Id.* at 569.

[80] *Id.* (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

[81] *Id.* (citing Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

[82] *Id.* at 570.

[83] *Id.* at 571-72. Following the logic of *Thompson*, the Court determined that age eighteen was "the point where society draws the line for many purposes between childhood and adulthood," and therefore was the "age at which the line for death eligibility ought to rest." *Id.* at 574.

[84] *Id.* at 575.

[85] *Id.* at 576. In citing international opinion, however, the Court made it clear that the position of the international community was not controlling, rather it provided "respected and significant confirmation" for the Court's own conclusions and was instructive on the interpretation of the cruel and unusual punishment clause of the Eighth Amendment. *Id.* at 575, 578.

[86] *Id.* at 568-72.

"forbid[s] [the] imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."[87]

D. Graham v. Florida

In the 2010 case of *Graham v. Florida*, the Supreme Court considered whether the Constitution permits sentencing juveniles convicted of non-homicide offenses to life without parole.[88] At age sixteen, Terrance Graham was convicted of armed burglary and attempted armed robbery.[89] Graham and three other youths attempted to rob a restaurant but fled after Graham's accomplice assaulted the restaurant manager.[90] Under a plea agreement, Graham received probation.[91] A month short of his eighteenth birthday, Graham violated the terms of his probation by committing additional crimes.[92] Against the recommendation of the prosecution, the trial judge sentenced Graham to life without parole for the initial armed burglary.[93] On appeal, Graham argued that his sentence was unconstitutionally disproportionate to his crimes and that categorically, the Eighth Amendment prohibits sentences of life without parole imposed on juveniles convicted of non-homicide offenses.[94]

The issue before the Court, then, fell between two categories of cases: cases involving as-applied challenges to sentence length (i.e., non-capital cases), and cases involving categorical challenges to the application of the Eighth Amendment to an entire class of offenders (i.e., capital cases).[95] Writing for the Court, Justice Kennedy found *Graham* to fall under the latter category because it "implicate[d] a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes,"

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[87] *Id.* at 578.

[88] 130 S. Ct. 2011 (2010).

[89] *Id.* at 2018.

[90] *Id.* The accomplice struck the restaurant manager in the head with a metal bar, requiring stitches for the manager's injury. *Id.*

[91] *Id.*

[92] *Id.* at 2019.

[93] *Id.* at 2019-20. The prosecution recommended a sentence of thirty years for the armed burglary and fifteen years for the attempted armed robbery. *Id.* at 2019.

[94] *Id.* at 2020.

[95] *Id.* at 2021.

and therefore, reasoned Kennedy, "a threshold comparison between the severity of the penalty and the gravity of the crime does not advance the analysis."[96]

The Court began its application of the evolving standards of decency analysis by examining the objective indicia of national consensus.[97] First, the Court looked to the legislative evidence.[98] Six states prohibited juvenile life-without-parole sentences for any offense,[99] seven prohibited juvenile life without parole sentences for non-homicide offenses,[100] and thirty-seven states including the District of Columbia permitted the punishment for non-homicide offenses.[101] While the prosecution argued that this metric proved a national consensus did not exist against the punishment in question, the Court disagreed.[102] It reasoned:

> There are measures of consensus other than legislation. Actual sentencing practices are an important part of the Court's inquiry into consensus. Here, an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use. Although these statutory schemes contain no explicit prohibition on sentences of life without parole for juvenile nonhomicide offenders, those sentences are most infrequent.[103]

Thus, the Court concluded that, because of the rarity of juveniles with convictions for non-homicide offenses receiving sentences of life without parole, "it is fair to say that a national consensus has developed against it."[104]

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[96] *Id.* at 2022-23.

[97] *Id.* at 2023.

[98] *Id.*

[99] These states are: Alaska, Colorado, Kansas, Kentucky, Montana, and Texas. *Id.* at 2035.

[100] These states include: Connecticut, Hawaii, Maine, Massachusetts, New Jersey, New Mexico, and Vermont. *Id.*

[101] *Id.* at 2023. The Court also noted that the federal government permitted the punishment in question. *Id.*

[102] *Id.*

[103] *Id.* (quoting Kennedy v. Louisiana, 554 U.S. 407, 433 (2008)).

[104] *Id.* at 2026 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)).

After finding a national consensus, the Court exercised its own independent judgment to determine if the punishment was unconstitutional.[105] First, the Court considered whether life without parole sentences are justified in light of the culpability of juveniles convicted of non-homicide crimes.[106] Citing *Roper*, the majority concluded that juveniles are categorically "less deserving of the most severe punishments" due to their reduced culpability."[107] The Court reasoned that, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," and therefore there was no need to reconsider the Court's observations in *Roper* concerning the unique nature of juveniles.[108] Next, the majority noted that categorically, non-homicide offenders are less deserving of the most severe modes of punishment than are murderers, to conclude, "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability."[109] Lastly, turning to the nature of the punishment, the Court pointed out the harshness of a life without parole sentence on a juvenile due to the actual length of time spent imprisoned.[110]

The Court also considered the penological justifications of juvenile life without parole sentences—retribution, deterrence, incapacitation, and rehabilitation.[111] In the Court's eyes, retribution was not justified because invoking the "second most severe penalty on the less culpable juvenile nonhomicide offender" is not proportionate.[112] In light of juveniles' lack of maturity and diminished sense of responsibility, deterrence did not suffice to justify the sentence either.[113] Further, the Court found incapacitation unjustifiable due to the challenging and speculative

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105 *Id.*
106 *Id.*
107 *Id.* (citing Roper v. Simmons, 543 U.S. 551, 569 (2005)).
108 *Id.*
109 *Id.* at 2027.
110 *Id.* at 2027-28.
111 *Id.* at 2028-29.
112 *Id.* at 2028.
113 *Id.* at 2028-29.

nature of making a judgment that a juvenile is incorrigible.[114] Lastly, the Court found the very nature of life without parole forswears the possibility of rehabilitation.[115] Accordingly, "[b]ecause '[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood,'" the Court held that "those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime."[116]

The Court's decision marked the first use of its "evolving standards of decency" analysis for a non-capital case.[117] Previously, this categorical approach was reserved for death penalty cases alone, based on the notion that "[d]eath is different."[118] Now, however, non-capital offenses are subject to categorical exemption under the Eighth Amendment. The remainder of this article argues, then, that under the evolving standards of decency analysis, sentencing juveniles to life without parole—for any crime—violates the Eighth Amendment because *juveniles are different.*

II. WHY JUVENILES ARE DIFFERENT

The Court's decision in *Graham* confirms the generally recognized notion that juveniles differ from adults in many distinguishable ways. In the legal context, the salient distinctions relate to a lack of maturity and decision-making ability formed during adolescence. Research suggests that these distinctions are explained by psychological and neurological differences between adults and adolescents.[119] These developmental differences, as outlined below, reduce the criminal culpability of juvenile offenders and make them, as a class, inherently "different" than adults.

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[114] *Id.* at 2029.

[115] *Id.* at 2029-30.

[116] *Id.* at 2030 (quoting Roper v. Simmons, 543 U.S. 551, 574 (2005)).

[117] *Id.* at 2022-23.

[118] *Id.* at 2046 (Thomas, J., dissenting). Justice Thomas further declared that "[t]oday's decision eviscerates that distinction. 'Death is different' no longer." *Id.*

[119] *See supra* note 11.

A. Psychological Differences between Adolescents and Adults

According to research in developmental psychology, adolescent involvement in criminal activity may be attributable to two forms of immaturity: cognitive and psychosocial.[120] Cognitive development refers to adolescents' ability to process information and use reasoning to make informed decisions, while psychosocial development concerns adolescents' judgment based on social and emotional factors that influence decision-making.[121] Both psychological capacities are required for sound judgment; however, they develop at different rates. Generally, cognitive control capacities increase linearly from childhood to adulthood, but begin to plateau at age sixteen.[122] Psychosocial maturity, however, continues to develop throughout adolescence.[123] Therefore, even in late adolescence, when teenagers' cognitive capacities may rival those of adults, psychosocial factors influence their decision-making differently than adults, thus affecting determinations of culpability.[124]

1. Diminished Capacity for Decision-Making

Among the psychosocial factors that influence decision-making and judgment, (1) peer influence, (2) risk assessment, (3) future orientation, and (4) impulse control, are particularly

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[120] *See* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 156-57 (1997); Cauffman & Steinberg, *supra* note 11, at 742-43; Steinberg & Scott, *supra* note 11, at 1011-12.

[121] *See* Scott & Grisso, *supra* note 120, at 157.

[122] *See, e.g.*, Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333, 343-44 (2003) (sixteen and seventeen-year-olds performed significantly better than fourteen and fifteen-year-olds on a test of fundamental cognitive capacities, but performed equally with eighteen to twenty-four-year-olds); Daniel P. Keating, *Cognitive and Brain Development*, *in* HANDBOOK OF ADOLESCENT PSYCHOLOGY 45, 64 (Richard M. Lerner & Laurence D. Steinberg eds., 2004) (cognitive abilities increased rapidly until approaching the limits of growth at the fourteen to sixteen age range); *see also* Leah H. Somerville & B.J. Casey, *Developmental Neurobiology of Cognitive Control and Motivational Systems*, 20 CURRENT OPINION NEUROBIOLOGY 236, 237 (2010) (describing growth of cognitive capacity as a linear function).

[123] *See* Cauffman & Steinberg, *supra* note 11, at 743-44.

[124] *See* Steinberg & Scott, *supra* note 11, at 1012.

important to determinations of criminal culpability in adolescents.[125]

a. Peer Influence

First, research—and the Court—confirms the conventional wisdom that teens are generally more susceptible than adults to peer influence.[126] Peer influence on adolescents' judgment operates both directly and indirectly.[127] In some contexts, adolescents might make decisions because they are directly coerced into taking risks they normally would avoid.[128] More indirectly, adolescents might make decisions based on their desire for peer approval (or the converse fear of peer rejection), even without any direct coercion.[129] Thus, adolescents have a heightened vulnerability to coercive circumstances, making them more likely than adults to alter their behavior in response to peer influences.

b. Risk Assessment

Second, adolescents and adults differ in their evaluation of, and attitude toward, risk.[130] Adolescents are more likely than adults to participate in risky behavior because adolescents generally place a higher value on reward in relation to risk than adults.[131] Research suggests that this relatively weaker risk aversion is due to adolescents' overvaluation of the potential reward of risky behavior, not because adolescents are less able than adults to appreciate risk.[132] Therefore, adolescents are more

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[125] *Id.*

[126] Roper v. Simmons, 543 U.S. 551, 569 (2005) ("[J]uveniles are more vulnerable . . . to negative influences and outside pressures, including peer pressure."); *see* Steinberg & Scott, *supra* note 11, at 1012.

[127] *See* Steinberg & Scott, *supra* note 11, at 1012.

[128] ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 38-39 (2008).

[129] *Id.*

[130] *See* Steinberg & Scott, *supra* note 11, at 1012.

[131] *Id.*

[132] *See* Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL. 459, 469 (2009); Steinberg & Scott, *supra* note 11, at 1012.

likely than adults to engage in risky behavior, including criminal activity.

c. Future Orientation

Third, adolescents are less future-oriented than adults because of a difference in temporal perspective.[133] Adolescents focus more on short-term consequences than adults, which could lead to rash decisions and risky behavior.[134] This tendency may be attributable to adolescents' lack of cognitive capacity to envision the future in hypothetical terms, or their lack of life experiences.[135] In either case, adolescents' diminished ability to foresee and consider the future consequences of their behavior makes them different than adults.

d. Impulse Control

Fourth, adolescents are less able to control their impulses than adults.[136] Impulse control refers to the ability to allow goal-directed emotions and actions to supersede goal-inappropriate ones.[137] This ability is limited in adolescents. They lack the self-restraint necessary to achieve adult levels of reasoning and consistent exercise of good judgment.[138] In fact, research suggests that the ability to control impulses does not fully form until approximately age thirty.[139] This inability to control impulses makes adolescents more likely than adults to react on reflex rather than sound judgment.

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[133] *See* Steinberg & Scott, *supra* note 11, at 1012.

[134] *Id.*

[135] *Id.*

[136] *See* Steinberg, *supra* note 132, at 470; *see also* Steinberg & Scott, *supra* note 11, at 1012-13.

[137] Beatrice Luna, *The Maturation of Cognitive Control and the Adolescent Brain, in* FROM ATTENTION TO GOAL-DIRECTED BEHAVIOR 251 (Francisco Aboitiz & Diego Cosmelli eds., Springer Berlin Heidelberg 2009).

[138] *See id.*; Steinberg, *supra* note 132, at 470.

[139] Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence of a Dual Systems Model,* 44 DEVELOPMENTAL PSYCHOL. 1764, 1774-76 (2008); *see* Steinberg & Scott, *supra* note 11, at 1012-13; Steinberg, *supra* note 132, at 469.

2. Relatively Unformed Character

In addition to juveniles' diminished capacity for decision-making, they also differ from adults because they have relatively unformed characters.[140] The process of developing one's character to form a personal identity is not complete until at least early adulthood.[141] This process often involves experimentation with risky, dangerous, and even criminal activities.[142] Therefore, criminal acts committed during this transient period often reflect characteristics of adolescence rather than an indication of "bad" character.[143] These characteristics, however, usually subside once a personal identity is fully formed.[144] Given this, it seems presumptuous to conclude that a juvenile will persist in criminal behavior beyond adolescence.

B. Neurological Differences between Adolescents and Adults

Emerging neurological research establishes a biological basis for the observed psychological differences between adult and adolescent behavior. In regard to decision-making, the adolescent brain differs from the adult brain in two respects. First, adolescent brains are not as structurally developed as adult brains in areas responsible for behavior control.[145] Second, in making decisions, adolescents rely more heavily than adults on regions of

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[140] Steinberg & Scott, *supra* note 11, at 1014.

[141] *See* SCOTT & STEINBERG, *supra* note 128, at 52 (observing that the final stages of the process of forming a personal identity occur during the time spent in college); Steinberg & Scott, *supra* note 11, at 1014 (discussing the notion that the resolution of identity crisis does not occur until late adolescence or early adulthood (citing Alan S. Waterman, *Identity Development from Adolescence to Adulthood: An Extension of Theory and a Review of Research*, 18 DEVELOPMENTAL PSYCHOL. 341, 355 (1982))).

[142] *See* Steinberg & Scott, *supra* note 11, at 1014.

[143] *Id.* at 1015.

[144] *Id.*

[145] *See* B.J. Casey et al., *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 62-77 (2008); Laurence Steinberg et al., *Are Adolescents Less Mature than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip Flop,"* 64 AM. PSYCHOLOGIST 583, 592 (2009); *see also* Sarah Durston & B.J. Casey, *What Have We Learned About Cognitive Development from Neuroimaging?*, 44 NEUROPSYCHOLOGIA 2149, 2150 (2006).

the brain associated with impulsive, risky, and sensation-seeking behavior.[146] These complementary differences are outlined below.

1. Differences in Brain Structure

Since the late 1990s, magnetic resonance imaging ("MRI") has allowed scientists to better understand adolescent brain development. Using this technology, scientific research shows that the brain's prefrontal cortex is "one of the last brain regions to mature," continuing to develop beyond adolescence.[147] The prefrontal cortex is part of the cognitive control system, and is the area within the frontal lobes of the brain associated with "response inhibition, emotional regulation, planning and organization."[148] In short, it is the portion of the brain responsible for rational decision-making.

Adolescents' prefrontal cortex is structurally immature in two ways that affect brain functioning. First, the process of pruning is incomplete. "Pruning" refers to the process of trimming excess brain tissue, called gray matter, from the outer surfaces of the brain.[149] This process strengthens the brain's ability to process information, reason, and make informed decisions.[150] And second, the process of myelination is incomplete. Myelination is the process by which neural pathways used to carry information are

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[146] *See* Amy L. Krain et al., *An fMRI Examination of Developmental Differences in the Neural Correlates of Uncertainty and Decision-Making*, 47 J. CHILD PSYCHOL. & PSYCHIATRY 1023, 1023-24 (2006); *see also* Adriana Galvan et al., *Earlier Development of the Accumbens Relative to Orbitofrontal Cortex Might Underlie Risk-Taking Behavior in Adolescents*, 26 J. NEUROSCIENCE 6885 (2006); Todd A. Hare et al., *Biological Substrates of Emotional Reactivity and Regulation in Adolescence During an Emotional Go-Nogo Task*, 63 BIOLOGICAL PSYCHIATRY 927 (2008).

[147] B.J. Casey et al., *Structural and Functional Brain Development and its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCHOL. 241, 243 (2000); *see* Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861 (1999); *see also* Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174, 8177 (2004); Sowell et al., *supra* note 11, at 8826.

[148] Elizabeth R. Sowell et al., In Vivo *Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859, 860 (1999).

[149] *See* Casey et al., *supra* note 147, at 244-46.

[150] *Id.* at 241.

coated with a white insulating substance called myelin.[151] This insulating process improves the reliability and speed of communication between different sections of the brain, which affects the processing of emotions.[152]

Together, pruning and myelination increase the brain's efficiency, thus improving impulse control and risk evaluation.[153] These processes continue to alter the composition of the brain throughout adolescence in the prefrontal cortex—the area of the brain responsible for rational decision-making.[154] Thus, as compared to adult brains, adolescent brains are structurally immature in the regions of the brain crucial to determinations of culpability.

2. Differences in Brain Usage

The socioemotional system, which is in the limbic and paralimbic sections of the brain, drives risky and impulsive behavior.[155] Because of the structural immaturity of the cognitive control system, adolescent brains rely more heavily on the earlier-developing socioemotional system to make decisions. The main area affected by the system's early development is the amygdala. The amygdala is "a neural system that . . . detect[s] danger and produce[s] rapid protective responses without conscious participation."[156] In other words, it processes emotions. The prefrontal cortex regulates the activity in the amygdala,[157] and since adolescents' prefrontal cortex is structurally immature, as discussed above, it has less control over the amygdala, thus less

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[151] *See* ELKHONON GOLDBERG, THE EXECUTIVE BRAIN: FRONTAL LOBES AND THE CIVILIZED MIND 144 (2001).

[152] *Id.*

[153] *See* Sowell et al., *supra* note 11, at 8828.

[154] In fact, research indicates that myelination of the prefrontal cortex continues to occur into early adulthood. *See* Giedd et al., *supra* note 147, at 861-62.

[155] *See* Steinberg, *supra* note 132, at 466.

[156] Abigail A. Baird et al., *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 1 (1999).

[157] *See* Mario Beauregard et al., *Neural Correlates of Conscious Self-Regulation of Emotion*, 21 J. NEUROSCIENCE RC165 (2001).

influence over emotions.[158] As a result, adolescents rely more on the amygdala than the prefrontal cortex to make decisions.[159] Stated differently, adolescents rely more heavily on emotions than adults when making decisions.

III. RECONSIDERING JUVENILE LIFE WITHOUT PAROLE

With its decision in *Graham v. Florida*, the Supreme Court adopted a categorical rule prohibiting life without parole sentences for defendants who committed non-homicide crimes before the age of eighteen.[160] In doing so, the Court examined the evolving standards of decency in the United States and held that the sentence violated the cruel and unusual punishment clause of the Eighth Amendment.[161] This Part argues that the reasoning used to reach that conclusion should also prohibit sentencing juveniles to life without parole for any crime.

A. Society's View of Juvenile Life Without Parole

When the Supreme Court decided *Graham*, thirty-seven states permitted juvenile life without parole sentences for non-homicide offenses.[162] In *Graham*, the prosecution argued that since the overwhelming majority of jurisdictions allowed the sentencing practice, there was no national consensus against its use.[163] The Court, however, relied almost entirely on the rarity of the actual imposition of the sentence to find that a consensus had developed against it.[164] Given this, the Court could find a national consensus against *all* juvenile life without parole sentences by taking such sentencing practices into consideration.

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[158] *See* Neir Eshel et al., *Neural Substrates of Choice Selection in Adults and Adolescents: Development of the Ventrolateral Prefrontal and Anterior Cingulate Cortices*, 45 NEUROPSYCHOLOGIA 1270, 1270-71 (2007).

[159] *See* Mary Beckman, *Crime, Culpability, and the Adolescent Brain*, 305 SCI. 596, 599 (2004).

[160] 130 S. Ct. 2011 (2010).

[161] *Id.* at 2034.

[162] *See supra* note 101 and accompanying text.

[163] *See supra* note 102 and accompanying text.

[164] *See supra* notes 103-04 and accompanying text.

Currently, forty-four states permit sentencing juveniles to life without parole for homicide offenses.[165] While this is an overwhelming majority of states, an examination of the actual imposition of the sentence sheds more light on the national consensus. Research indicates that there were approximately 39,694 homicides committed in the United States from 1980 to 2004 by offenders who were below the age of eighteen at the time of the crime.[166] Of the 39,694 juveniles, approximately 1,642 received sentences of life without parole—roughly 4.1 percent.[167] While this percentage indicates that sentencing juveniles to life without parole for homicide offenses is not as rare as the sentencing practice in question was in *Graham*,[168] it still reflects the nation's relative distaste for its imposition, and provides the Court with an opportunity to recognize a national consensus against its use.

B. The Court's Independent Judgment

Even if the Supreme Court does not find enough evidence to recognize a national consensus against sentencing juveniles to life without parole for homicide offenses, it could still find the sentence unconstitutional based on its own independent judgment. To make that judgment, the Court weighs the culpability of the class of offenders, the penological justifications of the sentencing practice, and the customs of the international community.[169]

In *Graham*, the Court recognized that juveniles, as a class, are less culpable than adults because of the psychological and neurological differences that exist between them.[170] When

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[165] *See supra* note 101 and accompanying text.

[166] *See* C. Puzzanchera & W. Kang, *Easy Access to the FBI's Supplementary Homicide Reports: 1980-2006*, http://www.ojjdp.gov/ojstatbb/ezashr/ (last visited Nov. 1, 2011) (using data from the Federal Bureau of Investigation, Supplementary Homicide Reports 1980-2008 [machine-readable data files]).

[167] *See* AMNESTY INT'L & HUMAN RIGHTS WATCH, *supra* note 1, at 41-42 (compiling the number of juveniles entering sentences of life without parole from 1980 to 2004).

[168] *See* Graham v. Florida, 130 S. Ct. 2011, 2024-25 (2010) (comparing the number of juvenile offenders sentenced to life without parole for non-homicide offenses with statistics from 2007 of certain types of offenses).

[169] *See* Thompson v. Oklahoma, 487 U.S. 815, 833 (1988).

[170] *Graham*, 130 S. Ct. at 2026.

invoking its own independent judgment, the Court should view this diminished culpability no differently when applied to homicide than when applied to non-homicide offenses because adolescents are developmentally immature in both circumstances. A child who commits murder is just as psychologically and neurologically ill-equipped to make decisions as a child who commits armed robbery. Additionally, "[l]ife without parole is an especially harsh punishment for a juvenile."[171] It is essentially "a death sentence without an execution date."[172] The severity of this punishment—one that is like a death sentence in many ways—combined with the diminished culpability of juveniles, should influence the Court to prohibit juvenile life without parole.[173]

The reduced culpability of juveniles also affects the penological purposes served by juvenile life without parole: retribution, deterrence, incapacitation, and rehabilitation.[174] Sentencing juveniles to life without parole is not justified because it does not further these goals.

First, sentencing juveniles to life without parole serves no valid retribution goals. Juveniles are less culpable and therefore less blameworthy than adults.[175] While they can cause harm just as adults can, they cannot bear the same responsibility. Also, society's entitlement to inflict harm on juvenile offenders in return for the harm inflicted on society can be met by sentencing juveniles to life imprisonment with the possibility—not the guarantee—of parole. Life imprisonment expresses society's condemnation of the crime and attempts to right the wrong to the victim just as life without parole does. The two only differ in that life without parole forecloses the opportunity to re-enter society. Thus, retribution fails as a justification for juvenile life without parole since a lesser punishment adequately serves its goal.

Second, juvenile life without parole does not further the penological goal of deterrence. By definition, deterrence relies on

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[171] *Id.* at 2028.

[172] William W. Berry III, *More Different than Life, Less Different than Death*, 71 OHIO ST. L.J. 1109, 1112 (2010).

[173] *Id.*

[174] *See supra* note 111 and accompanying text.

[175] *See supra* Part III.

the assumption that the offender is a rational calculator of the risk in relation to the reward of crime. As discussed above, adolescents inherently place more value than adults on reward in relation to risk.[176] This insufficiency makes suspect the deterrent value of life without parole as a punishment for juvenile offenders. Further, the strong possibility that only a marginal deterrent value is gained from sentencing juveniles to life without parole rather than life imprisonment supports the conclusion that deterrence fails here as a valid penological purpose.[177] In fact, the argument can be made that allowing juveniles the possibility of parole better serves the goal of specific deterrence because it allows them the possibility to be rehabilitated during imprisonment, which could deter them from a crime-ridden future.

Third, incapacitation fails as a legitimate penological goal of juvenile life without parole because it requires a judgment at the outset that an offender "never will be fit to reenter society" at an age where the defendant is not yet fully developed.[178] This one-time assessment is, at best, speculative. Because of the "transient immaturity" of juveniles,[179] there is a possibility that a juvenile offender may, at some point, no longer be dangerous to society. Thus, sentencing juveniles to life without parole is not justified by the goal of incapacitation.

Fourth, the goal of rehabilitation does not justify sentencing juveniles to life without parole. The sentence of life without parole, by definition, forecloses any possibility of rehabilitation. A sentence of life imprisonment, however, allows the possibility of rehabilitation while still serving the goal of incapacitation since the offender is not guaranteed eventual freedom.

The Court should also consider the global consensus against juvenile life without parole when making its independent judgment. The vast majority of the developed countries forbid imposing sentences of life without parole on juvenile offenders for

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[176] *See supra* Part III.A.1.b.

[177] *See* Berry, *supra* note 172, at 1134-35.

[178] Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

[179] *Id.* at 2029 (quoting Roper v. Simmons, 543 U.S. 551, 572 (2005)).

any crime.[180] While this fact is not controlling,[181] it should confirm the Court's judgment that juvenile life without parole is a cruel and unusual punishment.

IV. REDEFINING "JUVENILE"

As discussed above, adolescents differ from adults in many significant psychological and neurological ways.[182] They are more susceptible to peer influence, they place more value on reward in relation to risk, they are less future-oriented, they are less able to control their impulses, and they have relatively unformed characters.[183] Further, adolescents have structurally immature brains and rely more heavily than adults on regions of the brain associated with risky behavior.[184] These developmental differences reduce the criminal culpability of offenders who committed their crimes during adolescence—a developmental phase that varies in length among individuals. The Court, however, in the Eighth Amendment context, categorically limits this reduced culpability to offenders under age eighteen, which fails to mirror the transition to adulthood of many individuals. This arbitrary "age of majority" is too simplistic to determine if an individual is an adolescent or an adult for the purpose of receiving a sentence of death or life without parole. The use of a bright-line rule to define the end of adolescence distorts developmental reality by failing to consider variations in maturity, and is thus inadequate to assess culpability. After all, as the Supreme Court recognized, "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage."[185]

This article proposes, then, a framework that more adequately mirrors the transitory nature of adolescence. Offenders who commit crimes before age eighteen are viewed as categorically

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[180] *Id.* at 2033 ("[O]nly 11 nations authorize life without parole for juvenile offenders under any circumstances . . . .").

[181] *See id.* at 2034.

[182] *See supra* Part III.

[183] *See supra* Part III.A.

[184] *See supra* Part III.B.

[185] Eddings v. Oklahoma, 455 U.S. 104, 115 (1982).

less culpable than offenders over age eighteen.[186] This bright-line rule recognizes the inherent differences in development between adolescents and adults, but fails to account for those who psychologically or neurologically develop beyond age eighteen. A rule extending the arbitrary end date of adolescence would capture these outliers, as well as more accurately determine true culpability. Accordingly, this article advances a juvenile framework that supports a rebuttable presumption that an offender who commits a crime after their eighteenth birthday, but before their twenty-first, is less culpable than offenders over age twenty-one. This framework would allow the prosecution an opportunity to prove that an individual is developmentally mature, while safeguarding offenders who have not fully completed adolescence.

CONCLUSION

This article advocates for the abolishment of juvenile life without parole. After outlining the juvenile jurisprudence in the context of the Eighth Amendment, the article describes what makes juveniles inherently different than adults. Next, the article discusses how the Court could find juvenile life without parole cruel and unusual under the evolving standards of decency analysis. Lastly, this article proposes a basic framework for broadening the current meaning of "juvenile" to more adequately mirror the transitory nature of adolescence.

Michael Barbee

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[186] *See supra* Part I.D.

COMMENT

ANY CLUB THAT WOULD HAVE ME AS A MEMBER: THE HISTORICAL BASIS FOR A NON-EXPRESSIVE AND NON-INTIMATE FREEDOM OF ASSOCIATION

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INTRODUCTION

With the Supreme Court's recent decision in *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*,[1] the constitutional boundaries of associational freedom are as relevant as ever. Modern freedom of association doctrine hinges upon the level to which entities are intimate or expressive.[2] However, scholars have recognized that

[1] 130 S. Ct. 2971 (2010) (holding school's "all-comers policy," which required the Christian Legal Society to accept all applicants regardless of their religious beliefs, to be constitutional). Freedom of association precedent is not at the forefront of *Martinez*, as the opinion is based largely on limited-forum precedent. However, associational freedom was certainly the driving force behind the litigation, and as such, *Martinez* indicates that the contours of those rights remain unclear.

[2] *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995); N.Y. State Club Ass'n, Inc.

this analysis is problematic and may not offer adequate associational protection for certain groups.[3] Further, the origins of modern associational rights are unclear, and this has led to the uncertainty surrounding their true levels of protection. John Inazu argues that the right of assembly was "traded" for the freedom of association, which he believes emerged from *NAACP v. Alabama ex rel. Patterson*.[4] To counter his argument, this article will present historical and precedential evidence that a non-expressive, non-intimate freedom of association pre-dates *Patterson*, as it can be discerned from the debates amongst Fourteenth-Amendment framers and the opinions of nineteenth-century courts.

This paper proceeds in three main parts. Part I describes the questionable roots and current problems of the modern freedom of

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v. City of New York, 487 U.S. 1 (1988); Roberts v. U.S. Jaycees, 468 U.S. 609 (1984); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

[3] *See, e.g.*, Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association*, 35 U.C. DAVIS L. REV. 821 (2002); William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68 (1986); Seana Valentine Shiffrin, *What is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839 (2005); Neal Troum, *Expressive Association and the Right to Exclude: Reading Between the Lines in* Boy Scouts of America v. Dale, 35 CREIGHTON L. REV. 641 (2002); Kevin J. Worthen, *One Small Step for Courts, One Giant Leap for Group Rights: Accommodating the Associational Role of "Intimate" Government Entities*, 71 N.C. L. REV. 595 (1993).

[4] John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485, 486, 562 (2010) ("[N]either the right of association nor its doctrinal problems began with *Roberts*, as the Court first recognized a constitutional right of association just over fifty years ago in . . . *NAACP v. Alabama ex rel. Patterson*. . . . Much of the current vulnerability of the right of association stems from the Court's reformulation of that right in *Roberts*. But *Roberts* cannot bear all of the blame. If today's freedom of association is less protected than some might like it to be, the roots of its problems may lie in the political, jurisprudential, and theoretical factors present at its inception." (footnote omitted)) [hereinafter Inazu, *Strange Origins*]; John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 611-12 (2010) ("It may be that the principles encapsulated in the constitutional right of association embrace a kind of group autonomy that broadens the conception of assembly. But I suspect otherwise. I have detailed elsewhere the doctrinal problems with the freedom of association, both in its original form that emerged in . . . [*Patterson*] and its transformation in . . . [*Roberts*]. These cases and others have converted the right of association into an instrument of control rather than a protection for the people. In doing so, they have lost sight of the dissenting, public, and expressive groups that once sought refuge under the right of assembly." (footnotes omitted)) [hereinafter Inazu, *Forgotten Freedom*].

association doctrine. Part II presents the historical evidence that an alternative associational right is deeply rooted in the American tradition of civil liberty, beginning with the congressional debates surrounding the Civil Rights Act of 1875 and continuing with an overview of the traditional limits placed on the scope of public accommodation laws by contemporaneous courts. Finally, Part III utilizes these historical sources to propose a modification of the existing doctrine that would require (1) affording associational freedom to activities unaffected with a public interest, even if those activities are neither expressive nor intimate, and (2) recognizing that the vindication of social rights, as opposed to civil rights, does not constitute a public interest.

I. THE MODERN DOCTRINE

In 1958, the Supreme Court formally announced the freedom of association in *NAACP v. Alabama ex rel. Patterson* by holding that the NAACP could not be forced to disclose its membership list to state authorities.[5] The Court did not once mention the First Amendment, but rather focused on the "fundamental freedoms protected by the Due Process Clause."[6] In Justice Harlan's confusing opinion, the applicable fundamental freedom stemmed from the liberty provision of the Fourteenth Amendment, but embraced freedom of speech principles.[7]

Twenty-six years later, the Court recognized in *Roberts v. United States Jaycees* that implicit in this freedom of association is the freedom not to associate.[8] Despite this recognition, the Court held that Minnesota's public accommodation law could be

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[5] 357 U.S. 449 (1958).

[6] *Id.* at 460. It is interesting that the Court employed the Fourteenth Amendment without mentioning the First Amendment itself because, prior to *Patterson*, the Court *had* considered the First Amendment in Fourteenth Amendment contexts. *See* Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion) (holding that professor's conviction for refusal to answer questions concerning political affiliations violated his "liberties in the areas of academic freedom and political expression").

[7] *Sweezy*, 354 U.S. at 250. Professor Inazu suggests that the opinion's ambiguity was due to the pursuit of unanimity amongst the Court, and that certain Justices, such as Frankfurter, pushed for avoidance of First Amendment language. Inazu, *Strange Origins*, *supra* note 4, at 514.

[8] 468 U.S. 609, 623 (1984).

applied to require the Jaycees to accept women in their ranks.[9] For the Court, whether Minnesota's law violated the Jaycees' associational rights depended on whether the Jaycees were an intimate organization[10] or an expressive organization according to First Amendment principles.[11] The Court then asked whether the state had a compelling interest that could justify infringing the Jaycees' intimacy or expression, and whether such an infringement was the least restrictive means of achieving that state interest.[12] The Court found the Jaycees to be an expressive organization,[13] but also found that Minnesota had a compelling interest in preventing discrimination against women,[14] and because requiring the Jaycees to accept women would not inhibit its expression, it was the least restrictive means of achieving the state's anti-discrimination interests.[15]

The Court's pre-*Patterson* application of First Amendment principles to the states via the due process clause was murky, but most cases *did* deal with some form of direct expression.[16] As

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[9] *Id.* at 623, 626-27.

[10] *Id.* at 620. The Court noted that intimate associational protections are exemplified by cases involving marriage, childbirth, child-rearing, education, cohabitation, and other relationships "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others." *Id.* at 619-20. For the Court, the Jaycees' low level of selectivity was what primarily qualified it as non-intimate.

[11] *Id.* at 622 ("According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." (citing NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958))).

[12] *Id.* at 623-26.

[13] *Id.* at 626-27 (recognizing that the Jaycees engaged in many civic activities including lobbying and fundraising, and that these activities involved political stances, and therefore qualified it as an expressive organization).

[14] *Id.* at 625-26.

[15] *Id.* at 628-29. The Court found that the Jaycees failed to demonstrate that admitting women into its organization would impede it from engaging in these activities or "dissimenat[ing] its preferred views." *Id.* at 627. Further, being compelled to admit women would not prevent the organization from excluding individuals based on ideological differences and the Court also dismissed the notion that, if women were admitted, there would be some sort of inherent ideological shift or that the group's political stances would slowly change over time, refuting such an argument as stereotypical and generalized. *Id.* at 627-28.

[16] The incorporation of the First Amendment has a very ambiguous history. *See* Sweezy v. New Hampshire, 354 U.S. 234, 249-50 (1957) (plurality opinion)

such, *Patterson*, which arguably did not, serves as an odd bridge to the Court's holding in *Roberts* that only intimate and expressive associational rights are protected. This incongruence is apparent when one examines what elements *Patterson* lacks. It did not involve exclusion, discrimination, or public accommodation laws, and did not focus wholly on speech because it had little to do with expression. After all, the members of the NAACP wanted to *withhold* their identities. This is not to say that an organization cannot be expressive if its members are not known by name, but because Alabama was trying to force the organization to be more "extroverted" in a sense, and the NAACP was invoking the freedom of association to protect its ability to remain "introverted," it was a stretch for the Court to claim twenty-six years later that *expression* is a pre-requisite to non-intimate associational protection.[17]

("[P]etitioner's right to lecture and his right to associate with others were constitutionally protected . . . [by] the Fourteenth Amendment."); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) ("[I]t is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake."); Cantwell v. Connecticut, 310 U.S. 296, 305 (1940) ("Such a censorship of religion . . . is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth."); De Jonge v. Oregon, 299 U.S. 353, 364 (1937) ("Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution." (citations omitted)); Gitlow v. New York, 268 U.S. 652, 666 (1925) ("For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States. We do not regard the incidental statement in [*Prudential*] that the Fourteenth Amendment imposes no restrictions on the States concerning freedom of speech, as determinative of this question." (footnote omitted)); Prudential Ins. Co. of Am. v. Cheek, 259 U.S. 530, 543 (1922) ("[N]either the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the states any restrictions about 'freedom of speech' . . . .").

[17] Further, the *Patterson* Court had noted that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958). This language also suggests that *Patterson* protects the right *to associate*, not the right to associate *to express*. *See* Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 646 (2002) ("[Reliance on the principles of] expressive association has *shifted the focus away from associating* and to the more

The first problem with the *Roberts* transition to protecting only First Amendment free speech principles in non-intimate associational contexts is that it requires courts to pry into the inner workings of organizations in order to (1) discern any expressiveness, and (2) determine what effectuates such expressiveness or may permissibly inhibit such expressiveness.[18] Many believe that courts are ill-equipped to make those determinations.[19] While it is not wholly illogical or disingenuous to assume that an organization like the Jaycees loses minimal expressive ability by being forced to accept women, this "court intrusion problem" would continue to be exacerbated by post-*Roberts* courts[20] and it would reach its problematic peak in *Boy Scouts of America v. Dale* and its lower-court progeny.[21]

The second problem with the *Roberts* analysis is that it places little weight on whether an organization supplies goods or services to the public at large, which intuitively is a critical factor in determining whether its association can legitimately be deemed private. Rather than delving into the "quasi-public" elements of the Jaycees or determining that it was "affected with a public

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familiar First Amendment territory of speech, messages, and the like." (emphasis added)). Ultimately, while *Patterson* may have contained a multitude of First-Amendment-type language, the issue actually adjudicated did not seem to hinge on expression at all.

[18] *See* La. Debating & Literary Ass'n v. City of New Orleans, 42 F.3d 1483, 1500 (5th Cir. 1995) ("[I]f those clubs must go public, in order to remain private, then their privacy rights ring hollow indeed . . . .").

[19] *See* Shiffrin, *supra* note 3, at 847-48 ("[The analysis] requires judges to engage in fairly detailed, intrusive forms of interpretative review of what an association *really* stands for, what sorts of dissent and difference would *really* threaten that stance, what is *really* entailed by a policy statement, [and, in the case of *Dale*,] what it would *really* mean to be opposed to homosexuality, and how volubly, on what grounds, and in what fora someone who was *really* opposed to homosexuality would speak." (footnote omitted)).

[20] *See, e.g.*, Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 857 (2d Cir. 1996) (holding that after-school Christian group could be forced to accept non-Christians for certain officer positions because, for example, "an agnostic with an understanding of 'Christian Sensibilities' might plan these activities as well as any other student"); Pines v. Tomson, 206 Cal. Rptr. 866, 877-78 (Cal. Ct. App. 1984) (holding that the Christian Yellow Pages company could be forced to include non-Christian advertisers because, in the court's view, the Christians-only requirement likely did not further the organization's interest in providing its customers with opportunities to network with fellow Christian businesses anyway).

[21] 530 U.S. 640 (2000); *see* cases cited *infra* notes 30, 33.

interest" as earlier courts might have,[22] the Court instead averred that Minnesota could constitutionally assert a compelling interest in ensuring public access to intangibles such as leadership skills and business networking.[23] To the Court, the validity of this interest in ensuring access to such intangibles logically followed from the theretofore gradual expansion of public accommodation laws.[24] While it can hardly be said that this aspect of *Roberts* is a "transition" from *Patterson*,[25] it must be reemphasized that *Patterson* did not deal with exclusion or state anti-discrimination measures. It can therefore be argued that the *Roberts* Court relied upon shaky precedent for evaluating associational freedom as a defense to public accommodation law applicability. Just as the court-intrusion analysis would solidify with *Dale*, the level of attention given to the public nature of the groups' activities would deteriorate.

In 2000, the Supreme Court held in *Boy Scouts of America v. Dale* that New Jersey's public accommodation law was unconstitutional as applied to require the Boy Scouts of America (BSA) to retain a Scoutmaster whom the BSA discovered to be a homosexual gay-rights activist.[26] The Court had little difficulty determining that the BSA was an expressive organization,[27] but its majority and minority opinions went much further than

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[22] *See* discussion *infra* Part II.B.

[23] Roberts v. U.S. Jaycees, 468 U.S. 609, 623, 626 (1984).

[24] *Id.* at 626 ("This expansive definition [of public accommodation laws] reflects a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration . . . ." (citations omitted)). To the *Roberts* Court's credit, however, they did evaluate the Jaycees' level of selectivity, which is certainly indicative of its private or public nature, and future courts would fail to fully consider this aspect. *See, e.g.*, State v. Burning Tree Club, Inc., 554 A.2d 366, 379 (Md. 1989); Donaldson v. Farrakhan, 762 N.E.2d 835, 838-39 (Mass. 2002); Concord Rod & Gun Club, Inc. v. Mass. Comm'n Against Discrimination, 524 N.E.2d 1364, 1367 (Mass. 1988).

[25] The *Patterson* opinion contained little private or public analysis except for one portion, in which Justice Harlan noted that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958) (citation omitted).

[26] 530 U.S. 640, 656 (2000).

[27] *Id.* at 650.

Roberts in analyzing whether forced inclusion would violate the BSA's expressive associational rights. Reaffirming that this analysis requires courts to determine what an organization believes to be in its best interests, and how best to effectuate those interests, the Court examined BSA policy manuals, handbooks, and memos to determine "the nature of the Boy Scouts' view of homosexuality."[28] Despite Justice Rehnquist's assertions to the contrary,[29] the Court seemingly required there to be a strong showing that BSA sincerely held its views regarding the exclusion of homosexuals.[30] Justice Stevens, speaking for the minority, would have required an even greater display of the BSA's principles, stating that "[a]t a minimum, a group seeking to prevail over an antidiscrimination law must adhere to a clear and unequivocal view."[31] Myriad commentators have recognized the pitfalls of such over-zealous evaluations of organizational goals and messages,[32] but lower courts have nonetheless adhered to this approach.[33]

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[28] *Id.* at 650. The New Jersey Supreme Court had done the same thing, finding that the "exclusion of members solely on the basis of their sexual orientation is inconsistent with Boy Scouts' commitment to a diverse . . . membership . . . ." *Id.* at 650-51 (quoting Dale v. Boy Scouts of Am., 734 A.2d 1196, 1226 (N.J. 1999)) (internal quotation marks omitted).

[29] *Id.* at 651 ("[I]t is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent." (citations omitted)).

[30] There is a certain amount of tension in the opinion. First, Rehnquist asserted that the "inquiry necessarily requires us first to explore, to a limited extent, the nature of the Boy Scouts' view of homosexuality." *Id.* at 650. But later, in rejecting the New Jersey Supreme Court's finding that the exclusion of Dale was antithetical to Boy Scouts' philosophy, he stated, "[O]ur cases reject this sort of inquiry . . . ." *Id.* at 651. Perhaps the Court's divergent language can be reconciled as essentially stating that a review of organizations' inner workings was not necessary, but even if it were, the Boy Scouts' inner workings were consistent with its exclusion of Dale. Even so, it is clear that the Court required *some* consistency of message and exclusion, and if lower post-*Dale* courts are any indication, such consistency must be readily apparent. *See, e.g.*, Villegas v. City of Gilroy, 484 F.3d 1136, 1138, 1140 (9th Cir. 2007) (holding that a motorcycle club did not engage in any sort of expressive association in part because its views were internally inconsistent regarding what their insignia represented).

[31] *Id.* at 676 (Stevens, J., dissenting). Further, Justice Stevens disliked Justice Rehnquist's assertion regarding deference, claiming that the Court should not "look[] at what a litigant asserts in his or her brief and inquir[e] no further." *Id.* at 686.

[32] *See, e.g.*, Dale Carpenter, *Expressive Association and Anti-Discrimination Law after* Dale*: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1542 (2001) (arguing that

Also important, the *Dale* decision represents an abandonment of determining the public extent of private organizational activities. Having no objection to the fact that New Jersey "went a step further" with its public accommodation law by neglecting to link ensured access to a physical place, the Court merely recognized that the expansiveness of such laws creates more potential for conflicts between First Amendment freedoms and state anti-discrimination measures, which shows that the Court clearly viewed expression as the sole barrier to such laws.[34] As such, the Court failed to consider the argument that, in some situations, the First Amendment question should not even be addressed due to the private nature of the activities at issue. In other words, if it cannot be logically said that a public accommodation law ensures access to a certain activity in the first place, the expressiveness of that activity should be irrelevant to its associational integrity.[35]

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unpopular groups and those that encourage internal dissent and radical discussion will suffer the most under *Dale*'s approach of requiring a clearly articulated message); Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 120 (2000) ("The fine-spun efforts to shoehorn freedom of association into some ill-defined expressive box will breed only pointless and arcane distinctions."); Brody, *supra* note 3, at 851 (noting that the Court in *Dale* "struggle[d] with the distinction between speech and status" because "membership and message [are] not to be equated" and arguing that the Court treated Dale as walking speech, and that he did not violate any organizational beliefs by simply *being* gay); Shiffrin, *supra* note 3, at 848 ("Such review involves a form of judicial scriptwriting that is antithetical to a thorough-going concern about judicial imposition of content and the free exploration and articulation of ideas." (footnote omitted)).

[33] *See, e.g.*, Mill River Club, Inc. v. N.Y. State Div. of Human Rights, 873 N.Y.S.2d 167, 173 (N.Y. App. Div. 2009) (holding that club's freedom of association was not violated where public accommodation law prevented it from maintaining a membership composed half of Jews and half of Christians in order to promote diverse religious discussion because it did "not prevent the club from excluding applicants who [did] not subscribe to its goal of religious diversity in its membership, . . . [and] because it [did] not prohibit the club from advocating its viewpoint that a religiously diverse membership is vital").

[34] *Dale*, 530 U.S. at 657. *But see* Thomas v. Anchorage Equal Rights Comm'n, 102 P.3d 937, 946 (Alaska 2004) (stating that implicit in *Dale*'s holding was that New Jersey's public accommodation law simply went too far in the first place, despite the Court's brief gloss over its applicability).

[35] The *Dale* Court's lack of clarity on the permissible scope of public accommodation law applicability to private activities has perhaps framed some of the private-public confusion that lower courts have confronted. *See* Chi. Area Council of Boy Scouts of Am. v. City of Chi. Comm'n on Human Relations, 748 N.E.2d 759, 767-68

The rest of this paper presents evidence of an associational right, deeply rooted in the American tradition of civil liberty, which protects organizational freedom of association on a third level. This right emanates from the firmly established notion that legitimate government control of a private activity requires some showing that the private activity at issue is affected with a public interest. As discussed above, the *Patterson* Court had little cause to consider this notion, and as such, *Patterson* served as questionable precedent for *Roberts*. Therefore, the Court's modern analysis of individual freedom in the face of public accommodation laws is missing a key element. If the Court had instead focused on framers' and past courts' evaluations of public accommodation laws, it would have uncovered a legal tradition, valuing social autonomy, that places an initial safeguard between private organizations and legislative power.

II. HISTORY AND TRADITION

John Inazu argues that the freedom of association emerged from the Court's decisions in *Patterson* and contemporaneous cases.[36] While it is clear that the right was not formally announced until *Patterson*, and I would agree with Inazu that modern freedom of association scholarship errs in claiming that the right originated with *Roberts*, there is evidence that it significantly pre-dates *Patterson*, as it can be discerned from the emphasis unrelentingly placed on private autonomy by framers and courts in anti-discrimination contexts. Given that the Supreme Court's current approach to recognizing substantive due

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(Ill. App. Ct. 2001) (remanding for a determination of whether a non-scoutmaster position was sufficiently non-expressive such that a public accommodation law *could* ensure access to it); Donaldson v. Farrakhan, 762 N.E.2d 835, 840 (Mass. 2002) (standing for the notion that a place normally regarded as a public accommodation can become a "non-public enclave" under certain circumstances, thereby precluding public accommodation law applicability).

[36] Inazu, *Strange Origins*, *supra* note 4, at 486, 562. There, Inazu did not consider Fourteenth-Amendment-framing-era material in his analysis. *Id.* In his other extensive work, Inazu analyzed the history of the freedom of assembly, touching upon antebellum abolitionism, women's suffrage movements, New Deal labor movements, the civil rights movements, and the Red Scare, but again did not discuss this time period. *See* Inazu, *Forgotten Freedom*, supra note 4.

process rights hinges upon whether such a right is "deeply rooted in this Nation's history and tradition,"[37] this evidence suggests the existence of a non-expression-based associational right. This tradition of affording associational integrity to activities when they are private is apparent in two key historical and precedential areas: the congressional debates surrounding the Civil Rights Act of 1875, and the prior and subsequent cases limiting the applicability of state public accommodation laws.

A. The Congressional Debates Surrounding the Civil Rights Act of 1875

There is a cavity in freedom of association scholarship due to the absence of works analyzing how the Civil Rights Act of 1875 may frame the modern doctrine. While Alfred Avins examined the significance of this time period as it related to public accommodation laws in 1966, his piece is now severely dated and therefore does not consider any direct relevance between the congressional debates and post-*Roberts* cases.[38] These debates are a valuable resource because they are contemporaneous with the adoption of the Fourteenth Amendment and demonstrate what

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[37] Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (citations omitted). While Fourteenth Amendment framers likely would have considered any such freedom (if stemming from the Fourteenth Amendment) to derive from the privileges or immunities clause, for purposes of this article it is assumed that the historical standard for recognizing privileges and immunities is the same as the one for recognizing substantive due process rights. *See* Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed: Privileges or Immunities, the Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States*, 8 GEO. J.L. & PUB. POL'Y 1, 65-75 (2010) (suggesting that the *Glucksberg* standard could be supported by privileges or immunities clause); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. C.R. L.J. 219, 257 n.173 (2009) (same) [hereinafter Green, *(Equal) Protection Clause*]; Christopher R. Green, The Original Sense of "Of" in the Privileges or Immunities Clause 115-32 (Aug. 14, 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=1658010 (same) [hereinafter Green, Privileges or Immunities Clause].

[38] *See* Alfred Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 COLUM. L. REV. 873 (1966). However, Avins offers a much more thorough history of the Act, as well as an interesting discussion of the debaters' constitutional bases for approval and disapproval of the Act. *See id.* at 881.

framers were thinking in terms of forced inclusion.[39] In doing so, they illustrate an American tradition of affording associational autonomy to truly private organizations regardless of the intimate or expressive nature of the organizations' activities.

In 1870, Republican Senator Charles Sumner of Massachusetts introduced what would later be known as the Civil Rights Act of 1875.[40] The Act was designed to ensure equal access to public accommodations, including theaters, inns, public schools, churches, and cemeteries.[41] Perhaps the most controversial aspect of the legislation was that it could be enforced against private individuals.[42] As such, what qualified an entity or activity as "private" was bound to be the source of much debate. While struck down as unconstitutional by the Supreme Court's decision in *The Civil Rights Cases* in 1883,[43] the Act has relevance to current freedom of association doctrine due to the arguments surrounding its adoption. Through these arguments, in which private autonomy was highly valued, the framers made clear their belief in a non-expressive associational right applicable to purely private activities.

The Democratic senators opposing the Act thought the federal government should not have the power to regulate "hotel companies, theatrical companies, churches, schools, [etc.]" on such

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[39] As Professor Avins stated, "[T]he Constitution must be interpreted to meet new conditions, but the basic understanding of the framers cannot be discarded . . . ." *Id.* at 874; *see also* Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 591 (2006) ("[A]ssessments of constitutional reference, 'while not controlling upon [later interpreters of the Constitution] by reason of their authority, do constitute a body of experience and informed judgment to which [later interpreters] may properly resort for guidance.'" (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944))).

[40] The bill died in the Judiciary Committee several times, and was finally re-introduced as a rider to the amnesty bill authorized by the Fourteenth Amendment. CONG. GLOBE, 42d Cong., 2d Sess. 237 (1871).

[41] *See* CONG. GLOBE, 42d Cong., 2d Sess. 244 (1871).

[42] Indeed, when the Act was "revived" in 1964, this remained the most controversial aspect. *See* Melville B. Nimmer, *A Proposal for Judicial Validation of a Previously Unconstitutional Law: The Civil Rights Act of 1875*, 65 COLUM. L. REV. 1394, 1396 (1965).

[43] The Civil Rights Cases, 109 U.S. 3 (1883) (holding that the Fourteenth Amendment did not give Congress the authority to regulate private acts).

an intrusive level.[44] At the core of the arguments between Republicans and Democrats concerning access to public accommodations, however, was the private-public distinction. For Democratic senators like Garrett Davis of Kentucky, a corporate charter was not enough to "open[] those associations to every citizen who may choose to force his way into them."[45] Some Republicans agreed,[46] but the Act's supporters believed that public funding, derived from taxation, provided the critical public distinction.[47]

Democratic Senator Allen Thurman of Ohio illustrated countervailing concerns when he spoke of his disdain for the Act's application to cemeteries, which had the potential to render families unable to choose their burial neighbors.[48] When Thurman asked Congress whether it could "thrust into that cemetery . . . the body of any man," Republican Senator Matthew Carpenter reiterated his earlier interruption: "So far as they are supported by taxation."[49] In response to this, Thurman asked, "Is a common inn supported by taxation? . . . Does a common carrier derive his means from taxation?"[50] Sumner then joined in the exchange to further illustrate the ambiguities of formulating any private-public distinction, suggesting that *all* franchises deriving their protection from the laws would be subject to the act.[51] This seems

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[44] CONG. GLOBE, 42d Cong., 2d Sess. 764 (1872).

[45] *Id.*

[46] For Republican Representative Arthur Boreman of West Virginia: "Now, sir, many of the cemetery associations and the numerous benevolent associations that we have in the States, have acts of incorporation; . . . but they are for all practical purposes, and to all practical intent private establishments." CONG. GLOBE, 42d Cong., 2d Sess. 3195 (1872). Republican Senator Lot Morrill of Maine felt similarly, arguing that the privileges or immunities clause did not ensure access to "common schools, . . . churches, . . . benevolent institutions, . . . theaters and places of public amusement." CONG. GLOBE, 42d Cong., 2d Sess. app. 1-4 (1872).

[47] Republican Matthew Carpenter of Wisconsin: "I think the ground upon which this common right of all the citizens of this country to participate in the benefits of benevolent institutions should be based is not whether it happens or not to be incorporated, but whether it is supported at the public expense." CONG. GLOBE, 42d Cong., 2d Sess. 760 (1872).

[48] CONG. GLOBE, 42d Cong., 2d Sess. app. 27-29 (1872).

[49] *Id.* at 27-28.

[50] *Id.* at 28.

[51] *Id.* at 29 ("I submit it to the Senator, the innkeeper, and also the common carrier, has something in the nature of a franchise under the law. Each has peculiar

to have startled Thurman, whose response to Sumner warned of a vast and overreaching regulatory scheme through which the federal government would exercise too much control over private persons.[52]

These exchanges offer a terse preview of the public-private battles that would ensue for years after the enactment of the Fourteenth Amendment. The language employed by Republican Senator Frelinghuysen was particularly prophetic of later cases considering a "quasi-public" realm.[53] These portions of the debates also alluded to subsequent cases concerning the ability of legal and regulatory schemes to transform private into public and subject arguably private organizations to legislative control.[54]

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privileges and prerogatives, and is subject to peculiar responsibilities, the whole being the franchise which he derives from law, and which is regulated by law. The argument follows that in the exercise of that franchise he must conform to the fundamental principles of our institutions.").

[52] Thurman, after averring that law regulates every institution in *some* way, stated:

> It will not do therefore to say, that, because the law regulates inns, common carriers, and the like, therefore Congress has the power to . . . intrude upon the rights of the citizens and make laws that deprive him of that liberty which he ought to possess and which is guarantied [sic] to him. That is not regulation, it is usurpation and tyranny.

Id.

[53] *See* 2 CONG. REC. 3452 (1874) ("As the capital invested in inns, places of amusements, and public conveyances is that of the proprietors, and as they alone can know what minute arrangements their business requires, the discretion as to the particular accommodation to be given to the guest, the traveler, and the visitor is quite wide. But as the employment these proprietors have selected touches the public, the law demands that the accommodation shall be good and suitable, and this bill adds to that requirement the condition that no person shall, in the regulation of these employments, be discriminated against merely because he is an American or an Irishman, a German or a colored man.").

[54] *See* Frost v. R.R. Comm'n, 271 U.S. 583, 592 (1926) ("[C]onsistently with the due process clause of the Fourteenth Amendment, a private carrier cannot be converted against his will into a common carrier by mere legislative command . . . ."); Mich. Pub. Utils. Comm'n v. Duke, 266 U.S. 570, 577-78 (1925) ("[I]t is beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility . . . ."). While these two cases concerned railroad and highway regulations respectively, they could be employed for the general principle that, once a state public accommodation law purports to encompass certain activities and it is decided that an arguably private activity is covered, there has been some sort of legislative transformation of a private carrier into a common carrier. Those opinions focused on the argument that states did not have the power to enact such laws more so

While these skirmishes are instructive as to what congressmen considered to fall within the Act's reach, the focus should not *just* be on what exact activities or institutions each congressman thought to be private or public. Rather, another important aspect of these arguments stems from what they agreed upon: there was some private line that the Civil Rights Act of 1875 could not cross.

For example, the Democrats were particularly concerned with the Act's potential effects on clubs and club-like associations. Senators like Thurman thought that benevolent societies, such as Masonic or Odd Fellows lodges, ought to have the right to exclude black people completely.[55] Indeed, it appears Thurman thought that *any* club or group ought to have the right to exclude *anyone* on *any* basis, no matter how arbitrary.[56] And while perhaps not wholly in agreement with Thurman, some Republicans supported weakening the bill's applicability to such associations as well. Senator Roscoe Conkling of New York thought the bill should only cover institutions supported by taxes.[57] Further, Representative Boreman proposed, and Sumner accepted, that the portion of the Act covering benevolent institutions should include the language

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than the argument that citizens had the right not to have such laws applied to them. But they were nonetheless contemplating a private autonomy that hinged upon the public interest. *See Duke*, 266 U.S. at 576 ("He has done nothing to give rise to a duty to carry for others. The public is not dependent on him or the use of his property for service . . . ."); *see also* Donnell v. State, 48 Miss. 661, 682 (1873) (rejecting a Fifth-Amendment-takings-style argument against public accommodation law applicability).

[55] CONG. GLOBE, 42d Cong., 2d Sess. app. 27 (1872).

[56] *Id.* ("If the colored men should see fit to establish a club of black fat men, or fat black men—whichever is the proper expression—I do not see that they ought to be deprived of the privilege of doing it. Nay, more, sir, if the red-headed men in the city of Washington should choose to form a club of red-headed men, and say that nobody but red-headed men should be members of that club, I think they ought to have that privilege . . . .").

[57] CONG. GLOBE, 42d Cong., 2d Sess. 3266 (1872) ("[The term incorporated] is equivalent to 'authorized by law;' but the Senator will observe that he or I, in his State or mine, may under a general act or special charter go on and organize an institution which he and his friends, a little group of individuals, . . . endow. Many such exist in my own State. It is their private property. Nobody else has anything in the world to do with it. It is just a venture of their own . . . . I will take for illustration an institution established for the benefit of those unsound of mind. . . . It is established by private funds, to be sure; but it is established under law. It is not a private institution. It is open to anybody who chooses to go and pay, but is in no sense sustained by taxation. It is a mere voluntary private adventure of humanity, if I may so say, of those engaged in it. . . . Just as if it were a personal establishment.").

"of a public character," and that this public-character requirement should apply even to tax-supported institutions.[58]

However, one of the strongest indicators of the framers' recognition of private organizational autonomy is that they removed the provisions of the Act that applied to churches. While religious freedom under the free exercise clause was well-recognized,[59] theoretically, the presence of black people at a church would not have inhibited any religious expression.[60] As such, it appears the framers contemplated an intrinsic associational right, neither expressive nor intimate, but one largely of privacy, which could allow certain organizations to discriminate, regardless of incorporation.[61] Senators like Republican Oliver P. Morton noted that churches were "purely voluntary organizations."[62] When Senator Carpenter interrupted, "[Even] if they are incorporated?," Morton responded:

> Yes, sir, if they are incorporated. The Senator understands why they are incorporated. It is not for the purpose of affecting their faith. Acts of incorporation are not extended to churches because of the character of their faith. A Mohammedan church would be incorporated as readily as any other under the laws of any State. They are purely voluntary organizations, and they are incorporated as a matter of public convenience to enable them to hold property to carry out the purposes of the private voluntary organization.[63]

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[58] *Id.* at 3267. However, Sumner did not accept the amendment proposed by Democratic Senator George Vickers of Maryland that all institutions authorized by law must be of a public character to be covered. *Id.* Sumner's justification was that some institutions are authorized by law, but not tax-supported, and therefore should not be able to discriminate, giving the example of Harvard College. *Id.*

[59] Indeed, the First Amendment was the basis for the opposition to the churches provision. CONG. GLOBE, 42d Cong., 2d Sess. 896-97 (1872).

[60] That is, unless the religion itself called for segregation.

[61] Admittedly, churches are a far cry from certain benevolent institutions and societies. Many would argue that there is "just something different" about churches when it comes to the right to exclude. That is the point, however. This distinction is inarticulable and perhaps fleeting, but is there nonetheless.

[62] CONG. GLOBE, 42d Cong., 2d Sess. 898 (1872); *see also* CONG. GLOBE, 42d Cong., 2d Sess. app. 43 (1872) (Senator Vickers asserting no federal "right to interfere . . . with the churches in the States . . . .").

[63] CONG. GLOBE, 42d Cong., 2d Sess. 898 (1872).

Not only did the framers not rely on expression in their arguments that certain activities fell outside the Act's reach, the language above suggests that in their view, the level of an organization's expression was completely divorced from the question of whether the state could enforce public accommodation laws against it.

There are also numerous examples that senators on both sides of the debate felt that it was not within federal power to enforce or accelerate social equality, but rather that egalitarian social norms had to develop gradually and naturally.[64] While Democrats employed such arguments in opposition to the Act,[65] Republicans like Senator Frelinghuysen employed them in attempt to ensure the Act's limited reach, stating:

> Again let me say that this measure does not touch the subject of social equality. That is not an element of citizenship. The law which regulates that is found only in the tastes and affinities of the mind; its law is the arbitrary, uncontrolled human will. You cannot enact it.[66]

This general disdain for the enforcement of social equality would recur in cases both contemporaneous and remote, and be one of

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[64] CONG. GLOBE, 42d Cong., 2d Sess. app. 29 (1872) (Senator Thurman: "No one pretends that a colored man should not have accommodation at an inn . . . . What his bill aims to accomplish—disguise it as you may—is social equality in the inn."); *id.* at 217 (Representative Henry McHenry of Kentucky: "If a man sees proper to associate with negroes, . . . I would not abridge his right to do so; but that is a very different thing from compulsory social equality and association with those whose company is distasteful to him."). Also, concerning the social repercussions of such an Act, Democrats believed it would inspire in blacks contempt for their state governments and dependency on the federal government. 2 CONG. REC. app. 4 (1874) (Representative John Glover of Missouri: "I would not eternally parade him before Congress and the nation, and thus teach him to despise the State government under which he lives . . . .").

[65] For example, Eli Saulsbury of Delaware stated: "Disguise it as you may, it is nothing more nor less than an attempt on the part of the American Congress to enforce association and companionship between the races in this country." 2 CONG. REC. 4157 (1874).

[66] 2 CONG. REC. 3451 (1874).

the strongest arguments against state anti-discrimination measures.[67]

At the end of the day, "Sumner could afford to ignore the protests of a Democrat" to the Act.[68] But fellow Republican Senators' protests, like Lot Morrill's, attacked Sumner's asserted constitutional bases for the bill.[69] In response, Sumner pleaded:

> Why, sir, the Constitution is full of power; it is overrunning with power. I find it not in one place or in two places or three places, but I find it almost everywhere, from the preamble to the last line of the last amendment. . . . I find it, still further, in that great rule of interpretation conquered at Appomattox . . . . I say a new rule of interpretation for the Constitution, according to which, in every clause and every line and every word, it is to be interpreted uniformly for human rights.[70]

As such, seven Republicans did not vote for the Act, and it passed with a vote of only 38 to 26. Sumner died in 1874, and only a truncated version of his bill passed, lacking such provisions as the ones that covered schools and cemeteries.[71] The Act would be

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[67] *See, e.g.*, Ferguson v. Gies, 46 N.W. 718, 720-21 (Mich. 1890) ("Socially people may do as they please within the law, and whites may associate together, as may blacks, and exclude whom they please from their dwellings and private grounds; but there can be no separation in public places between people on account of their color alone which the law will sanction. . . . The man who goes either by himself or with his family to a public place must expect to meet and mingle with all classes of people. He cannot ask, to suit his caprice or prejudice or social views, that this or that man shall be excluded because he does not wish to associate with them. He may draw his social line as closely as he chooses at home, or in other private places, but he cannot in a public place carry the privacy of his home with him, or ask that people not as good or great as he is shall step aside when he appears.").

[68] Avins, *supra* note 38, at 883.

[69] Namely, Morrill attacked Sumner's reliance on the Declaration of Independence. CONG. GLOBE, 42d Cong., 2d Sess. app. 3 (1872).

[70] CONG. GLOBE, 42d Cong., 2d Sess. 727 (1872).

[71] In its final form, the Act provided:

> Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law: Therefore,

overruled in 1883, but in the debates surrounding its adoption, a consensus amongst the framers emerges—one valuing private associational integrity. The true disagreement, then, regarded merely what activities *were private* and therefore entitled to such autonomy.[72] Even Sumner himself recognized that such purely

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> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.
>
> SEC. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby . . . ; and shall also, for every such offense, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year . . . .
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> . . .
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> SEC. 3. That the district and circuit courts of the United States shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses against, and violations of, the provisions of this act . . . .
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> . . .
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> SEC. 4. That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.
>
> SEC. 5. That all cases arising under the provisions of this act . . . shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy . . . .

Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

[72] *See* Green, Privileges or Immunities Clause, *supra* note 37, at 118-20 nn.32-36. Green recognizes this Republican acknowledgment that Democratic arguments as to associational freedom were not unfounded, but that they simply did not apply in the opinion of Republican supporters, stating:

private associational autonomy precluded intrusion by law, stating:

> Now, there is no question of society here. The Senator may choose his associates as he pleases. They may be white or black, or between the two. That is simply a social question, and nobody proposes to interfere with it. That taste which the Senator has now declared belongs to him he will have free liberty to exercise always, selecting always his associates; but when it comes to rights, there the Senator must obey the law, and I insist that by the law of the land all persons without distinction of color shall be equal before the law.[73]

Ultimately, this unanimity amongst the framers—that associational autonomy should block the intrusion of government anti-discrimination measures at some threshold of privacy—shows that the framers believed in the existence of some non-expressive and non-intimate associational right.[74] This is inferable because the institutions at issue—theaters, hotels, trains, cemeteries, schools, churches, etc.—arguably lost nothing in the way of intimacy or expression by being forced to include black people,[75] yet the framers still valued their social impenetrability. Also important, First Amendment arguments arose only in religious

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> My point here is not to adjudicate whether the Republicans or the Democrats were right about where to draw the line between private social association and the realm of public privileges and civil rights . . . but simply that Republicans did acknowledge the existence of a social realm—*somewhere*—in which (a) moral rights against racial insult were invaded, but (b) constitutional rights to equal citizenship were not.

Id. at 157-58 n.220.

[73] CONG. GLOBE, 42d Cong., 2d Sess. 242 (1872). Not to be repetitive, but Sumner's language at this point then circled back around to the private versus public distinction, expressing that which made the bill unsupportable in the eyes of its opponents: "Show me, therefore, a legal institution, anything created or regulated by law, and I will show you what must be opened equally to all without distinction of color." *Id.*

[74] Note, however, that there is no right to *social* association. City of Dallas v. Stanglin, 490 U.S. 19, 23-25 (1989) (holding that social events like dances do not entail "intimate human relationships" protected by the First Amendment).

[75] Of course, arguments could be made that institutions like theaters would lose *something* in the way of expression and that cemeteries would lose *something* in the way of intimacy, but it cannot be genuinely argued that such institutions faced the same sort of potential interference as the Jaycees in *Roberts* or the Boy Scouts in *Dale*.

contexts, and in essence, it appears that the framers could not have foreseen the necessity of invoking expression or intimacy in order to substantiate the claim of a private organization that it has the right to exclude others. Rather, to them, public-accommodation-law enforceability depended on the public nature of activities (i.e. to what degree it could be said that members of the public should be ensured access to those goods or services) and differentiating civil and social rights.

B. Older Courts & Public Accommodation Laws

The legal history of America is replete with instances of judicial insulation of the private sphere from the legislative branch.[76] The Supreme Court delved into such matters as early as 1819 when it decided in *Trustees of Dartmouth College v. Woodward* that, under the contracts clause of the Constitution, the New Hampshire Legislature could not transform Dartmouth College into a public institution.[77] There, legal notions as to what was private or public were much simpler; government control of an institution appeared to be the dispositive factor in such determinations, as the concept of "quasi-public" did not seem to play into the Court's analysis:

> When the corporation is said, at the bar, to be public, it is not merely meant, that the whole community may be the proper objects of the bounty, but that the government have the sole

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[76] *See* Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424-25 (1982) ("Although one can find the origins of the idea of a distinctively private realm in the natural-rights liberalism of Locke and his successors, only in the nineteenth century was the public-private distinction brought to the center of the stage in American legal and political theory. Before this could occur, it was necessary to undermine an earlier tradition of republican thought that had closely identified private virtue and public interest. . . . Above all was the effort of orthodox judges and jurists to create a legal science that would sharply separate law from politics. By creating a neutral and apolitical system of legal doctrine and legal reasoning free from what was thought to be the dangerous and unstable redistributive tendencies of democratic politics, legal thinkers hoped to temper the problem of 'tyranny of the majority.'" (footnote omitted)).

[77] 17 U.S. (4 Wheat.) 518 (1819) (holding that the charter granted by the British crown to the trustees of Dartmouth College in 1769 was a contract within the meaning of the contracts clause and would be unconstitutionally breached by New Hampshire's legislative interference).

> right, as trustees of the public interests, to regulate, control and direct the corporation, and its funds and its franchises, at its own good will and pleasure. Now, such an authority does not exist in the government, except where the corporation, is in the strictest sense, public; that is, where its whole interests and franchises are the exclusive property and domain of the government itself.[78]

With the increasing ubiquity of railroads and industry, however, judicial recognition was inevitable that some private enterprises were intertwined with the public interest and, therefore, should not be completely immune to legislative control. In *New Jersey Steam Navigation Co. v. Merchants' Bank of Boston*, the Court weighed in on these concerns, stating that such entities are "in the exercise of a sort of public office, and ha[ve] public duties to perform."[79] States followed suit. In 1858, for example, the Wisconsin Supreme Court held that the Milwaukee Gas Light Company was of a public character due to the type of commodity it provided and distinguished it from enterprises that sold such things as "soap, candles or hats."[80]

After the Civil War, the enactment of the Fourteenth Amendment, and the advent of public accommodation laws,[81] considerations of private and public would become germane in

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[78] *Id.* at 671-72.

[79] 47 U.S. (6 How.) 344, 382 (1848); *see also* Olcott v. Supervisors, 83 U.S. (16 Wall.) 678, 694 (1872) ("That railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence.").

[80] Shepard v. Milwaukee Gas Light Co., 6 Wis. 539, 545 (1858). Notably, an important factor in the court's determination that the company was of a public character was the fact that it had the exclusive right to sell gas. *Id.* at 547 ("[As such,] how can it be urged that this is a mere private corporation for the manufacture and sale of a commercial commodity."). In the early twentieth century, Bruce Wyman recognized this to be a pattern amongst courts asserting private corporations' public character. Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156, 161 (1904) ("Upon the whole the circumstances surrounding these cases suggest this as the characterizing thing; that in the private calling the situation is that of virtual competition, while in the public calling the situation is that of virtual monopoly.").

[81] Some states had public accommodation laws prior to the *Civil Rights Cases*, but most state public accommodation laws developed after the Supreme Court held such laws unconstitutional on the federal level.

social and civil senses rather than just economic ones. We have seen such arguments fleshed out on the legislative level with the adoption of the Civil Rights Act of 1875, but ultimately, it was the courts that would have to determine what institutions would be affected by public accommodation laws. Even before the Supreme Court solidified "quasi-public" as the standard for legislative regulation of private enterprises in economic contexts in *Munn v. Illinois*,[82] lower courts were acknowledging that the activities of private entities had to be of a public character before public accommodation laws could be enforced against them.

For some courts, showings of public interest simply hinged upon whether the private entity in question was licensed. In *Commonwealth v. Sylvester*, the Massachusetts Supreme Court held that the state public accommodation law could not be enforced against the owner of an unlicensed, private billiards hall.[83] The court held such despite arguments from the Massachusetts attorney general that the establishment was of sufficient public character to be regulated irrespective of any formal license.[84] Licensing would play into other courts' analyses,[85] but some would focus less on licensing and other explicit incorporation elements and concentrate more on the public interest at stake.

In *Donnell v. State*, for instance, the Mississippi Supreme Court found that a theater violated the state public

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[82] 94 U.S. 113 (1876).

[83] 95 Mass. 247, 247-48 (1866).

[84] *Id.* at 247.

[85] *See, e.g.*, Bowlin v. Lyon, 25 N.W. 766 (Iowa 1885). There, the court was willing to consider the overall nature of the establishment in determining whether it was private or public, but obviously considered the absence of a state license to strongly suggest that it was private. *Id.* at 768 ("[Licensed establishments carry out] business under an authority conferred by the public, the presumption is that the intention was that whatever of advantage or benefit should result to the public under it should be enjoyed by all its members alike. . . . [But because the defendant was not licensed,] [t]he public had assumed no control of it, and it does not appear that it is a business in which the public have a concern."); *see also* Faulkner v. Solazzi, 65 A. 947, 948 (Conn. 1907) (holding that although barbers are licensed for the public welfare, proprietors and building-owners that house barbers may not be licensed, and the barber shop was therefore not a public accommodation); Hargo v. Meyers & Ludecke, 2 Ohio Cir. Dec. 543 (1889) (noting that just because defendant restaurant was licensed did not make them public and obligated to accommodate everyone).

accommodation law by refusing to sell a ticket to a black man.[86] The court rejected a Fifth-Amendment-takings-style argument that the law appropriated private property for the public use,[87] instead finding the theater to be quasi-public, and as such, among those "subjects which have always been under legal control."[88] The Pennsylvania Supreme Court noted in *West Chester & Philadelphia Railroad Co. v. Miles* that "[c]ourts of justice may interpose to compel those who perform a business concerning the public, by the use of private means, to fulfil [sic] their duty to the public,—but not a whit beyond."[89] As such, it is apparent that these courts were well aware of the quasi-public standard and had been utilizing it in their analysis of public accommodation laws.

As mentioned earlier, in 1876 the Supreme Court endorsed the quasi-public standard for evaluating legislative regulation of commercial activity in *Munn v. Illinois*.[90] It seems that post-*Munn* courts then amplified their evaluations of institutions' public characters in public accommodation contexts. In deciding whether a skating rink was a public accommodation in *Bowlin v. Lyon*, the Iowa Supreme Court employed such language extensively,[91] but found the lack of public control and presence of exclusive control by the business owner to be the most significant factor.[92] The New York Court of Appeals came to the opposite conclusion in *People v. King*, noting that, although "[t]he line of demarkation [sic] between [public accommodation laws'] lawful and unlawful exercise is often difficult to trace," the principles of *Munn* required it to hold that "the *quasi* public use to which the owner . . .

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[86] 48 Miss. 661 (1873).

[87] *Id.* at 682 ("The assertion of a right in all persons to be admitted to a theat[er] . . . in no sense appropriates the private property of the lessee, owner or manager, to the public use.").

[88] *Id.* at 681.

[89] 55 Pa. 209, 212 (1867).

[90] 94 U.S. 113 (1876).

[91] 25 N.W. 766, 767 (Iowa 1885) ("In all matters of mere private concern he is left free to deal with whom he pleases . . . . There are, however, classes of business in the conduct and management of which, notwithstanding they may be conducted by private parties . . . , the general public has such interest as that they are properly the subject of regulation by law . . . ."); *id.* at 768 ("The ground upon which these restrictions are imposed is that persons engaged in these vocations are in some sense servants of the public . . . .").

[92] *Id.*

devoted his property [gave] the legislature a right to interfere."[93] Similar analyses produced a wide variety of results.[94]

Another indicator that public character was the threshold issue for nineteenth and early-twentieth-century courts can be found in recurring assertions that wrongfully excluded plaintiffs were not denied social rights, but contractual, property, and civil

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[93] People v. King, 18 N.E. 245, 247, 249 (N.Y. 1888).

[94] *Compare* Fruchey v. Eagleson, 43 N.E. 146 (Ind. App. 1896) (holding that an inn was a public accommodation due to its dictionary definition, which contained the word "public"), Ferguson v. Gies, 46 N.W. 718 (Mich. 1890) (holding a restaurant to be a public accommodation), Messenger v. State, 41 N.W. 638, 639 (Neb. 1889) (holding a barber shop to be a public accommodation because "[a] barber, by opening a shop, and putting out his sign, thereby invites every orderly and well-behaved person who may desire his services to enter his shop during business hours"), Fowler v. Benner, 13 Ohio N.P. (n.s.) 313 (1912) (holding that an ice cream parlor was a public accommodation), Johnson v. Humphrey Pop Corn Co., 14 Ohio Cir. Dec. 135 (1902) (holding that a bowling alley was a public accommodation, although not statutorily mentioned), *and* Babb v. Elsinger, 147 N.Y.S. 98, 100 (N.Y. App. Div. 1914) (holding that a saloon was a public accommodation because "[d]rinking places have been, from time immemorial, subject to legislative control"), *with* Cecil v. Green, 43 N.E. 1105 (Ill. 1896) (holding that a soda fountain in a drug store was not a public accommodation), Brown v. J.H. Bell Co., 123 N.W. 231 (Iowa 1909) (holding that a coffee booth at a food show, though rented from grocers' association, was not a public accommodation because the merchant had no interest in and did not affect association as a whole), Rhone v. Loomis, 77 N.W. 31 (Minn. 1898) (holding that a saloon was not public accommodation because the statute did not name such establishments specifically), Burks v. Bosso, 73 N.E. 58 (N.Y. 1905) (holding that a bootblacking stand was not a public accommodation), *and* Kellar v. Koerber, 55 N.E. 1002 (Ohio 1899) (holding that a saloon was not a public accommodation because doing so would violate public policy by encouraging liquor trafficking and the frequenting of such establishments). *But see Brown*, 123 N.W. at 237 (Evans, C.J., dissenting) ("[Despite any contractual relationship between the merchant and the association,] [s]o far as the public was concerned the pure food show was one enterprise. The fact that many persons representing many lines of goods participated in the enterprise did not in any sense destroy its unity."); *Rhone*, 77 N.W. at 33 (Start, C.J., dissenting) (responding to the majority by claiming it to be clear that the legislature intended the law to encompass such establishments due to their public nature despite a lack of express recognition by the legislature). The converse can also be used to illustrate that an organization's public character was the starting point for the courts: where a black man was denied admission to an orchestra and there was no public accommodation law, the Supreme Court of Missouri noted that "it is not necessary to a proper disposition of this case to say how far or to what extent theaters are to be regarded as public places . . . ." Younger v. Judah, 19 S.W. 1109, 1111 (Mo. 1892); *see also* Grannan v. Westchester Racing Ass'n, 47 N.E. 896 (N.Y. 1897) (holding that a race track did not violate public accommodation law by excluding a man that attempted to bribe a jockey, as that man was not part of the "public" to which the law ensured access, even assuming the law could be said to apply to race track).

rights.[95] Presumably, in a perfectly egalitarian legal system, only private institutions are capable of denying social rights because true *social* status can only be conferred by private entities. Conversely, only public institutions are capable of denying civil rights because only those institutions provide services generally regarded as afforded to all persons.[96] Following this logic, the courts' continued explicit statements that plaintiffs were not being denied social rights in those circumstances shows that the courts' analyses first required resolution of the public-private issue and that social rights were not considered public benefits.

Thus, the question then becomes what actual *rights* did lawyers assert to shield defendants from public accommodation

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[95] *See Brown*, 123 N.W. at 233 ("These civil rights acts do not confer equality of social rights or privileges, nor could they enforce social intercourse, and it is doubtful, to say the least, if they could be made to apply to purely private business."); Coger v. Nw. Union Packet Co., 37 Iowa 145, 157 (1873) ("Without doubting that social rights and privileges are not within the protection of the laws . . . , we are satisfied that the rights and privileges which were denied plaintiff are not within that class. . . . Her money would not purchase for her that which the same sum would entitle a white passenger . . . . In these matters her rights of property were invaded . . . ."); *Ferguson*, 46 N.W. at 720 ("Socially people may do as they please within the law, and whites may associate together, as may blacks, and exclude whom they please from their dwellings and private grounds; but there can be no separation in public places between people on account of their color alone which the law will sanction."); People v. King, 18 N.E. 245, 248 (N.Y. 1888) ("It is of course impossible to enforce social equality by law. But the law in question simply insures to colored citizens the right to admission, on equal terms with others, to public resorts, and to equal enjoyment of privileges of a *quasi* public character."); *Johnson*, 14 Ohio Cir. Dec. at 138 ("A man is at liberty to select for his associates whom he will, provided only that the party whom he selects is willing to be his associate. . . . [B]ut this does not give [him] . . . the right to say who shall be admitted to the privileges of the public places . . . ."). *But see Brown*, 123 N.W. at 237 (Evans, C.J., dissenting) ("It does not attempt to deal with social rights, nor is there any question of social rights involved in this case, nor was the humiliation of the plaintiff a mere 'social humiliation,' as indicated in the majority opinion.").

[96] *See* Bell v. Maryland, 378 U.S. 226, 293 (1964) ("A review of the relevant congressional debates reveals that the concept of civil rights which lay at the heart of both of the contemporary legislative proposals and of the Fourteenth Amendment encompassed the right to equal treatment in public places—a right explicitly recognized to be a 'civil' rather than a 'social' right."); *id.* at 294 ("Although it was commonly recognized that in some areas the civil-social distinction was misty, the critical fact is that it was generally understood that 'civil rights' certainly included the right of access to places of public accommodation for these were most clearly places and areas of life where the relations of men were traditionally regulated by governments." (footnote omitted)).

law applicability? Generally speaking, they argued in terms of "property" and "individual liberty" and relied upon the notion that they should be able to autonomously conduct their businesses.[97] The language employed by the Illinois Supreme Court in *Cecil v. Green* is particularly suggestive of a contractual-type liberty:

> The personal liberty of an individual in his business transactions, and his freedom from restrictions, is a question of the utmost moment; and no construction can be adopted by which an individual right of action will be included as controlled within a legislative enactment, unless clearly expressed in such enactment, and certainly included within the constitutional limitation on the power of the legislature.[98]

While this language does allude to contractual rights, *Munn* had recently made it *relatively* clear that economic liberties were not considered fundamental rights in the face of legislative regulation.[99] As such, it seems that courts recognized a separate, non-economic right of persons to associate on an immediate level, and the related right of those persons to be free from legislation affecting those aspects of their affairs that did not touch on the public interest.

Further, if one accepts the proposition discussed above that legislatures extend *social* rights to plaintiffs by forcing their

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[97] *See, e.g.*, Donnell v. State, 48 Miss. 661, 682 (1873) ("[C]ounsel for the appellant has [argued] . . . that private property shall not be taken for public use unless compensation be first made.").

[98] 43 N.E. at 1106.

[99] Munn v. Illinois, 94 U.S. 113, 125 (1876) ("From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law."). If courts *were* basing any associational autonomy purely on contractual liberty (which is unlikely due to (1) the holding in *Munn*, and (2) the courts' continual reiterations of the evils of enforcing social equality), then the constitutional basis for such autonomy would run headlong into later Supreme Court cases such as *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (holding that a Kansas statute did not violate substantive due process by requiring debt-adjusters to be lawyers). However, it must be noted that the Court *has* approved economic fundamental rights in the area of commercial speech. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (holding that statutory bans on advertising prescription drug prices violated the First and Fourteenth Amendments). Perhaps a commercial freedom of association right is not so attenuated from a commercial free speech right.

access to private institutions, it follows that by doing so, they infringe upon the social rights of defendants. Therefore, at least in cases where the organization at issue was genuinely private, courts had to be recognizing *some* associational right. This right may have included within it contractual liberty, but it did not at all depend on expression or intimacy. And, whether defendants ultimately prevailed or not, courts were recognizing this right as an initial matter, as evidenced by their persistent practice of first analyzing the public character of defendant organizations.

Contemporaneously, the "separate but equal" line of cases, though they espouse a now-debunked doctrine, illustrate that the presence of public interest was the key concern in discrimination contexts. While relying on antiquated notions of racial inferiority, those courts determined that, just as some establishments were so affected with the public interest that they could not exclude, some establishments furthered the public interest *by* segregation.[100] Of course, at the center of these cases is *Plessy v. Ferguson*.[101] There,

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[100] *See, e.g.*, Chiles v. Chesapeake & Ohio Ry. Co., 218 U.S. 71, 77 (1910) ("The extent of the difference based upon the distinction between the white and colored races which may be observed in legislation or in the regulations of carriers has been discussed so much that we are relieved from further enlargement upon it."); The Sue, 22 F. 843, 846 (D. Md. 1885) ("This discrimination on account of race or color is one which it must be conceded goes to the very limit of the right of a carrier to regulate the privileges of his passengers, and it can only be exercised when the carrier has it in his power to provide for the passenger, who is excluded from a place to which another person, paying the same fare, is admitted, accommodations equally safe, convenient, and pleasant."); *Coger*, 37 Iowa at 150 ("The defendant, as a common carrier of passengers, had the legal right . . . to adopt *reasonable rules* and regulations concerning the convenience, comfort, and safety of its passengers . . . ."); Roberts v. City of Boston, 59 Mass. 198, 208 (1849) ("The power of general superintendence vests a plenary authority . . . to arrange, classify, and distribute pupils, in such a manner as they think best adapted to their general proficiency and welfare."); People *ex rel.* Cisco v. Sch. Bd., 61 N.Y.S. 330, 331 (N.Y. App. Div. 1899) ("[T]he school authorities have power, when in their opinion the interests of education will be promoted thereby, to establish schools for the exclusive education of colored children . . . ."); W. Chester & Phila. R.R. Co. v. Miles, 55 Pa. 209, 212 (1867) ("The right of the carrier to separate his passengers is founded upon two grounds—his right of private property in the means of conveyance, and the public interest. . . . to preserve order and decorum . . . ."); Commonwealth v. George, 61 Pa. Super. 412, 422 (1915) ("The defendant was permitted to make reasonable regulations for the comfort and convenience of his patrons, such regulations as the established usages, customs and traditions of the people, and the preservation of the public peace and good order demand.").

[101] 163 U.S. 537 (1896).

while the Supreme Court considered then-prevailing public interests in upholding Louisiana's railroad segregation law,[102] Harlan's famous dissent disagreed with the Court's asserted balance of such interests, but most importantly, in asserting that balancing those interests should yield the opposite result, Harlan continually reiterated the public nature of the discrimination at issue.[103] Further, because Louisiana's law prevented blacks and whites from sitting together even if they wanted to, it certainly infringed upon associational freedom, and Harlan's language indicated that he was contemplating this sort of freedom in his dissent:

> If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so; and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each. . . . If a state can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street, and black citizens to keep on the other?[104]

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[102] *Id.* at 544 ("[The Fourteenth Amendment] could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.").

[103] Harlan belabored the point that railroads are quasi-public entities. *Id.* at 553-54 (Harlan, J., dissenting) (citing Township of Pine Grove v. Talcott, 86 U.S. (19 Wall.) 666, 676 (1874); Olcott v. Supervisors, 83 U.S. (16 Wall.) 678, 694 (1872); N.J. Steam Nav. Co. v. Merchants' Bank of Boston, 47 U.S. (6 How.) 344, 382 (1848)). Then, he stated:

> In respect of civil rights, common to all citizens, the [C]onstitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. . . . If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race.

Id. at 554, 562. This shows that Harlan recognized (1) that Plessy had been denied *civil* rights, and (2) that civil rights pertain to public activities, not private ones.

[104] *Id.* at 557.

In 1907, the Supreme Court would pass upon the validity of a California public accommodation law in *Western Turf Association v. Greenberg*.[105] Writing for an undivided Court, Harlan echoed the sentiments of the state courts discussed above by noting that the establishment at issue was "so far affected with a public interest that the state may, in the interest of good order and fair dealing, require defendant to perform its engagement to the public . . . ."[106] Fifty-seven years later, Justices Douglas and Goldberg in *Bell v. Maryland* would indicate that these historical notions of association in the face of public accommodation had stuck: associational rights are not violated by such laws when the establishment is sufficiently public.[107] The opinion is brimming with language contemplating associational freedom in the context of public accommodation laws,[108] but Justice Goldberg's concurrence perhaps says it best:

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[105] 204 U.S. 359 (1907).

[106] *Id.* at 364. It is interesting to note that as far as the establishment's defense, Harlan would only consider whether the public accommodation law deprived it of property without due process of law. *Id.* at 363. The Court would not consider whether the law deprived the establishment of liberty without due process of law because it was a corporation, as Harlan noted that "the liberty guaranteed by the 14th Amendment against deprivation without due process of law is the liberty of natural, not artificial, persons." *Id.* If the general consensus was that only individual liberty was protected by the Fourteenth Amendment, this explains the practice discussed above of defendants stating their defenses in terms of property and contractual liberty (i.e., not relying so much on liberty provision of the Fourteenth Amendment), and courts recognizing them as such. This does not mean, however, that concerns of individual liberty were not implicit in the courts' analyses.

[107] 378 U.S. 226, 242, 255 (Douglas, J., concurring) (1964) ("Are they not as much affected with a public interest? Is the right of a person to eat less basic than his right to travel . . . ?"); *id.* at 286 (Goldberg, J., concurring).

[108] *Id.* at 252 (Douglas, J., concurring) ("Private property is involved, but it is property that is serving the public. As my Brother GOLDBERG says, it is a 'civil' right, not a 'social' right, with which we deal."); *id.* at 253 ("Some businesses, like the classical country store . . . make the store an extension, so to speak, of the home. But such is not this case."); *id.* at 261-62 ("So far as the corporate owner is concerned, what constitutional right is vindicated? It is said that ownership of property carries the right to use it in association with such people as the owner chooses. The corporate owners in these cases—the stockholders—are unidentified members of the public at large, who probably never saw these petitioners, who may never have frequented these restaurants. What personal rights of theirs would be vindicated by affirmance? Why should a stockholder in Kress, Woolworth, Howard Johnson, or any other corporate owner in the restaurant field have standing to say that any associational rights

> Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.
>
> We deal here, however, with a claim of equal access to public accommodations. This is not a claim which significantly impinges upon personal associational interests . . . .[109]

The importance of *Bell* is that, with minimal reference to *Patterson*,[110] the Court evaluated the associational freedoms of establishments affected by public accommodation laws according to the degree to which those establishments' activities were public. The *Bell* opinion itself also relied upon historical sources,[111] and as such, it indicates that the *Roberts* Court had a historical basis from which it could have determined that passing upon the validity of any public accommodation law should require a determination of whether the activity at issue is truly public and an evaluation of whether plaintiffs are litigating social or civil rights.

The above material tends to show that there is a historical basis, deeply rooted in the American tradition of civil liberty, for a non-expressive and non-intimate associational right based on privacy. This right is apparent from the tendency of courts to first determine the public extent of an organization's activities when deciding on public-accommodation-law enforceability. It is further evidenced by courts' acknowledgments that the purely social rights of plaintiffs could not be vindicated outside a civic realm,

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personal to him are involved? Why should his interests—*his associational rights*—make it possible to send these Negroes to jail?") (emphasis added).

[109] *Id.* at 313 (Goldberg, J., concurring).

[110] The Court considered *Patterson* in the context of whether an organization had standing to assert the constitutional rights of its individual members. *Id.* at 267 (Douglas, J., concurring).

[111] *Id.* at 291-300 (Goldberg, J., concurring) (discussing the debates surrounding the adoption of the Fourteenth Amendment and the Civil Rights Acts of 1866 and 1875); *id.* at 299 (citing Donnell v. State, 48 Miss. 661 (1873)); *id.* at 313 (citing Ferguson v. Gies, 46 N.W. 718 (Mich. 1890)).

which implicitly recognizes the rights of defendants in purely social settings. Finally, it is clear that the *Patterson* Court did not carve the freedom of association out of whole cloth and that modern courts therefore have a deeper historical basis on which to recognize a third level of associational autonomy—one that would require considering organizations' public degree before inquiring into their intimacy or expression.

III. A NEW APPROACH FROM THE HISTORICAL TRADITION

The evidence presented outlines a historical tradition of valuing organizations' private autonomy that began with the inception of the Fourteenth Amendment and continued as courts ruled on public accommodation suits. For an acknowledgment of this tradition to have any practical use, two questions must be answered. First, which methods of determining an organization's private nature have the firmest historical and precedential support? Second, how would those methods alter the modern freedom of association analysis?

One can glean three approaches from the congressional debates surrounding the Civil Rights Act of 1875. First, there is the view of Thurman, who seemed to think that state anti-discrimination measures could not be constitutionally imposed on any non-state actor.[112] At the other extreme is Sumner's initial approach, which presumed that any institution receiving the benefits of incorporation, even churches and cemeteries, could not claim the freedom of association in the face of state anti-discrimination measures.[113] Finally, there is Carpenter's analysis, which would constitute the ultimate approach of the Civil Rights

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[112] *See* discussion *supra* Part II.A; *see also supra* notes 52, 55, 56 and accompanying text.

[113] *See* discussion *supra* Part II.A; *see also supra* note 51. But see, for example, *Faulkner v. Solazzi*, which illustrates the primary counter-concern to Sumner's position, stating:

> In a sense, every business which has a promise of success within it is one which appeals to a public need, and in the sense that it supplies a need it is for the public accommodation. But the term 'public accommodation,' as descriptive of places within the purview of the act, clearly was not chosen as one to be interpreted in any such all-embracing sense.

65 A. 947, 949 (Conn. 1907).

Act of 1875 and have the most resilience amongst the state courts. This approach maintained that state anti-discrimination measures could be imposed on private entities as long as they were common carriers or other entities traditionally regarded as "affected with the public interest."[114]

However, even within the prevailing approach, two sub-methodologies for determining public accommodation law applicability and validity emerge. First, there are those courts and justices that attempted to interpret such laws liberally, and sought ultimately to further the "spirit" of anti-discrimination.[115] Second, there are those that endeavored to apply principles of statutory interpretation to such laws, and in doing so they also pondered what activities and institutions could logically be encompassed by such laws based on how public those activities and institutions were.[116]

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[114] *See* discussion *supra* Part II.A; *see also supra* notes 47, 53 (Frelinghuysen arguing similarly), 57 (Conkling), 58 (Boreman) and accompanying text.

[115] *See, e.g.*, Brown v. J.H. Bell Co., 123 N.W. 231, 237 (Iowa 1909) (Evans, C.J., dissenting) ("[Inasmuch as the plaintiff was refused service because she was black,] it seems to me that the case comes fairly within the letter of the statute, and clearly within its spirit. . . . The majority opinion is professedly 'divorced from sentiment'; but the statute is a statute of sentiment."); Rhone v. Loomis, 77 N.W. 31, 33 (Minn. 1898) (Start, C.J., dissenting) ("[Despite the fact that the statute does not mention saloons,] its meaning is clear, and it is manifest that the legislature intended to place saloons within the statute . . . ."); Grannan v. Westchester Racing Ass'n, 47 N.E. 896 (N.Y. 1897) (relying heavily upon legislative goals by holding that plaintiff was not entitled to recover because he was white and was not excluded based on his color); Johnson v. Humphrey Pop Corn Co., 14 Ohio Cir. Dec. 135, 137-38 (1902) ("Surely if these statutes are to accomplish the purposes declared . . . , the word 'person' must be held to include artificial persons, that is, private corporations . . . . It was without doubt the intention of the legislature to enact into positive law what has come to be recognized as justice . . . .").

[116] *See, e.g.*, *Faulkner*, 65 A. at 949 ("In a sense, every business which has a promise of success within it is one which appeals to a public need, and in the sense that it supplies a need it is for the public accommodation. But the term 'public accommodation,' as descriptive of places within the purview of the act, clearly was not chosen as one to be interpreted in any such all-embracing sense."); *Brown*, 123 N.W. at 233 ("[T]he statute under consideration was not made to, nor does it, apply to every private business, even if the Legislature had the power to make it so read, and the enumeration of places in the nature of inns . . . , of public conveyances . . . , and places of amusements, necessarily excludes all other places of business or places of amusement not of the kind enumerated."); *Rhone*, 77 N.W. at 32 ("In this act . . . the legislature specifically enumerates the places and things to which its provisions should apply at great length and with great particularity . . . but nowhere mentions saloons, or

This historically-based, non-expressive, and non-intimate freedom of association would protect private organizations to the degree that they are not affected with a public interest. Because "affected with a public interest" essentially means providing a benefit to which the public should be entitled, on a practical level, this right would function by limiting the range of activities, institutions, and ultimately, benefits that public accommodation laws could reach according to the approaches discussed above. Regardless of which approach is followed, it is likely that neither would deem intangibles such as "business contacts" and "leadership skills" as public benefits, at least not as far as they are gleaned from private functions. These are the sorts of things that the Court presumed to be encompassed by Minnesota and New Jersey public accommodation laws in *Roberts* and *Dale* respectively, and as such, that presumption is the aspect of modern freedom of association doctrine that would be altered by the historical right.

Under the first approach, ensured access to such benefits is conceivable but unlikely. For the framers and older courts, even liberal interpretations of public accommodation laws and furtherance of anti-discrimination goals pertained to covering a wider range of *physical* places. Admittedly, as concepts of social equality (and social mobility) evolved, state legislatures probably discerned an interest in ensuring access to more intangible benefits. Therein lies the point, however; such goals pertain to

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places where intoxicating drinks are sold."); Burks v. Bosso, 73 N.E. 58, 59 (N.Y. 1905) ("[I]f bootblacking stands are to be brought within the purview of the statute . . . , it will require no great stretch of the imagination to apply this statute to innumerable places and callings that have never been, and probably never will be, regarded as subject to legislative control . . . ."); Babb v. Elsinger, 147 N.Y.S. 98, 100 (N.Y. App. Div. 1914) ("Drinking places have been, from time immemorial, subject to legislative control. . . . If an inn is a place of public accommodation, why not a place where intoxicating liquors are sold in which the public has, from the earliest times, shown greater solicitude than in inns? It is of the greatest significance that in England the equivalent of the word 'saloon' as used in this country is the word 'public house.'"); People *ex rel.* Cisco v. Sch. Bd., 61 N.Y.S. 330, 332 (N.Y. App. Div. 1899) ("The entertainment offered in one of such places is no equivalent to that offered in another. . . . Places of public amusement are for the furnishing of particular entertainment. Each differs from all others. Each is sui generis."); Fowler v. Benner, 13 Ohio N.P. (n.s.) 313, 320 (1912) ("The duty of the court, in this instance, is wholly that of interpretation and construction . . . .").

social equality, not civil equality. And, as discussed in Part II, when the state confers purely social rights outside the civic realm to the public through an unwilling private party, that private party's associational freedoms are infringed.

Applying the second approach, ensured access to intangible benefits becomes even more unlikely. Strict interpretation of statutes ensuring access to "business establishments" and "public places" cannot readily yield the conclusion that the legislature has created a public gate to social benefits. Even though legislatures are probably capable of enumerating every conceivable locale, event, or organization in their laws, the framers and courts would have rejected such wide latitude, at least to the extent that they deemed the benefits conferred to be of a social character.

CONCLUSION

Modern freedom of association doctrine examines the intimate or expressive nature of organizations to determine whether they may exclude persons in the face of state public accommodation laws. Commentators have recognized the flaws of this approach, which stemmed from the Court's decision in *Roberts* and its questionable reliance upon *Patterson*. John Inazu argues that the freedom of association emerged in *Patterson* and that historical sources largely suggest that the freedom of assembly was traded for the modern freedom of association in *Patterson*. In response, this article argues that a freedom of association (distinct from the freedom of assembly) pre-dates *Patterson*, as it is discernable from the debates amongst Fourteenth Amendment framers and the opinions of contemporaneous courts. These sources reveal an associational right, deeply rooted in the American tradition of civil liberty, that protects the associational autonomy of activities and institutions to the extent that they are not affected with a public interest.

This historically-based approach inquires first into what public interests, if any, are affected by an organization's activities and, therefore, places sensible (and often tangible) limits on public accommodation laws. While older courts ranged in their analyses from construing such laws liberally to viewing them through the lens of strict statutory interpretation, one pattern is evident: to the extent that plaintiffs sought to have their *social* rights

vindicated they were denied relief, and courts continually recognized that purely social functions were not encompassed by public accommodation laws. In the end, the compass for locating the line between public and private may remain imprecise and inconsistent, but it is clear that under a historically-based approach to freedom of association, the position of that line is the threshold inquiry, and ultimately, the vindication of purely social rights does not traverse it.

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